LEXSEE

FIRE INSURANCE EXCHANGE, as a subrogee of Donald and Julie Crawford, Plaintiffs, v. ELECTROLUX HOME PRODUCTS and BEST BUY STORES, L.P., Defendants.

CASE NO. 05-70965

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 76161; 61 U.C.C. Rep. Serv. 2d (Callaghan) 181

October 11, 2006, Decided
October 11, 2006, Filed

SUBSEQUENT HISTORY: Motion denied by Fire Ins. Exch. v. Electrolux Home Prods., 2007 U.S. Dist. LEXIS 17340 (E.D. Mich., Mar. 13, 2007)

COUNSEL: [*1] Fire Insurance Exchange As a Subrogee of Donald and Julie Crawford, Plaintiff: Bradley S. Bensinger, Bensinger, Cotant, Grand Rapids, MI; E. Curtis Roeder, Thomas J. Evenson, Hanson, Lulic, Minneapolis, MN.

For Electrolux Home Products, Incorporated, Defendant: J. Steven Johnston, Bigler, Berry, Troy, MI.

For Best Buy Company, Incorporated, Defendant: Robert A. Obringer, Garan Lucow, Troy, MI.

For Best Buy Stores, L.P., Defendant: Robert A. Obringer, Kellie Blair, Garan Lucow, Troy, MI.

JUDGES: Denise Page Hood, United States District Court Judge.

OPINION BY: Denise Page Hood

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on Defendant Electrolux's Motion for Summary Judgment filed on December 7, 2005, and Defendant Best Buy Stores, L.P.'s Motion for Summary Judgment filed on December 7, 2005. Plaintiff Fire Insurance Exchange filed Responses to Defendants Electrolux's and Best Buy's Motions for Summary Judgment on December 27, 2005.

Plaintiff's Complaint, removed to this Court by Defendant Electrolux on March 11, 2005 pursuant to 28 U.S.C. § 1441(b) [*2] , alleges five counts against Defendant Electrolux: Negligence (Count I), Strict Products Liability (Count II), Express Warranty (Count III), Implied Warranty (Count IV), and Failure to Warn (Count V). Plaintiff likewise alleges five counts against Defendant Best Buy: Negligence (Count VI), Strict Products Liability (Count VII), Express Warranty (Count VIII), Implied Warranty (Count IV), and Failure to Warn (Count X).

II. STATEMENT OF FACTS

Plaintiff Fire Insurance Exchange is an insurance company authorized to do business in Michigan. (Pl.'s Comp. at P 2). Plaintiff Fire Insurance issued a policy to Donald and Julie Crawford, Plaintiff's subrogors, insuring property located at 11167 Cathy Drive, Goodrich, Genesee County, Michigan 43438. (Pl.'s Comp. at P 2). Defendant Electrolux Home Products, Inc. is a corporation organized under the laws of the State of Ohio, and is a home appliance manufacturer and wholesaler, authorized to do business in Michigan. (Pl.'s Comp. at P 3; Def.'s Notice of Removal, at 3). Defendant Best Buy Stores, L.P. is a retailer authorized to do business in Michigan. (Pl.'s Comp. at P 4).

Shortly after moving into their residence in 1997, Plaintiff's [*3] subrogors purchased a White-Westinghouse WD546 dryer manufactured by Defendant Electrolux. (Pl.'s Resp. in Opp'n to Electrolux's Mot. for Summ. J., at 4). Defendant Best Buy delivered and installed the dryer in the Crawford's residence. (Pl.'s Comp. at P6). The dryer came with Installation and

Operating Instructions, an Owner's Guide and labeling on the dryer itself. (Pl.'s Resp. in Opp'n to Defendant Electrolux's Mot. for Summ. J., at 4). About two weeks prior to February 10, 2004, the Crawfords heard a low, intermittent squeak coming from the dryer during each initial drying cycle. (Pl.'s Resp. in Opp'n to Defendant Electrolux's Mot. for Summ. J., at 5). The dryer otherwise performed normally. (*Id.*) On February 10, 2004, the dryer malfunctioned causing a fire to occur within the dryer. (Pl.'s Comp. at P 8). The fire spread throughout the residence, causing damage to Plaintiff's subrogors' real and personal property, as well as causing Plaintiff's subrogors to incur additional living expenses. (Pl.'s Comp. at P 9). Experts retained on behalf of Plaintiff determined that the origin of the fire was the laundry room and the dryer was the source of the ignition. (Pl.'s Resp. in Opp'n [*4] to Defendant Electrolux's Mot. for Summ. J., at 5).

Pursuant to the insurance policy, Plaintiff Fire Insurance Exchange made payments in excess of twenty-five thousand dollars ($ 25,000.00) to the Crawfords for the damage to their real and personal property and for their additional living expenses. (Pl.'s Comp. at P 14).

III. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is to be entered if the moving party demonstrates there is no genuine issue as to any material fact. The Supreme Court has interpreted this to mean that summary judgment should be entered if the evidence is such that a reasonable jury could find only for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *see also Lenz v. Erdmann Corp.*, 773 F.2d 62 (6th Cir. 1985). In resolving a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986); [*5] *Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983). But as the Supreme Court wrote in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

To create a genuine issue of material fact, the nonmovant must do more than present "some evidence" of a disputed fact. "If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment [*6] may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). Accordingly, a nonmovant "must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact." *Mathieu v. Chun*, 828 F. Supp. 495, 497 (E.D. Mich. 1993) (citations omitted).

IV. APPLICABLE LAW AND ANALYSIS

In its Motion, Defendant Electrolux requests this Court to grant its Motion for Summary Judgment because Plaintiff has failed to establish a prima facie case in this products liability action either on a negligence or a breach of warranty theory. Defendant further asserts that Plaintiff's failure to warn and express warranty claims fail due to the fact that the Plaintiff's subrogors, Donald and Julie Crawford, did not read any of the materials supplied with the Electrolux dryer. As a result, Plaintiff can not demonstrate the requisite showing of a causal connection. Lastly, Defendant asserts that there is no claim for strict tort liability in Michigan.

In its Motion, Defendant Best Buy requests that this Court grant its Motion for Summary Judgment because Plaintiff's claim does not fall within the ambit of Michigan's product liability [*7] law applicable to a non-manufacturer seller. Accordingly, Best Buy is not liable for harm allegedly caused by the product and dismissal of the action against it is warranted under Michigan law.

A. Electrolux's Motion for Summary Judgment (Counts I-V)

1. Negligence (Count I)

a. Design

"A manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable

injury." *Fisher v. Kawasaki Heavy Indus., LTD.*, 854 F. Supp. 467, 468 (E.D. Mich. 1994). Manufacturers do not act as insurers indemnifying any and all injuries arising out of the use of their products. *Prentis*, 421 Mich. at 682-83. The Sixth Circuit has interpreted Michigan case law to require a plaintiff to demonstrate the following criteria in order to establish a prima facie case of design defect, known as the risk utility balancing test:

> 1. That the severity of the injury was foreseeable by the manufacturer;
>
> 2. That the likelihood of occurrence of the injury was foreseeable by the manufacturer at the time of distribution of the product;
>
> 3. That there was a reasonable alternative design available;
>
> 4. That the available alternative [*8] design was practicable;
>
> 5. That the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and
>
> 6. That omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

Hollister v. Dayton Hudson Corp., 201 F.3d 731, 738 (6th Cir. 2000). Additionally, in order for a plaintiff to prevail in a cause of action against a manufacturer alleging injury from a defective product [1], the plaintiff must establish "a defect attributable to the manufacturer and causal connection between the defect and the injury or damage . . . ." *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 98-99, 133 N.W.2d 129 (1965). The jury may infer a defect in the product from circumstantial evidence. *See Caldwell v. Fox*, 394 Mich. 401, 410, 231 N.W.2d 46 (1975).

> 1 This also applies to a breach of warranty claim.

Defendant Electrolux argues that Plaintiff [*9] has failed to establish that Defendant Electrolux was negligent in its design of the dryer purchased by the Crawfords. According to Defendant, Plaintiff's expert, Charles Fricke, is not only unqualified in his expertise and experience, but also has failed to establish the requisite showing of fault on the part of Defendant Electrolux. Plaintiff counters that it has produced sufficient evidence under the applicable risk-utility balancing test to overcome Defendant Electrolux's Motion for Summary Judgment.

It is Defendant Electrolux's contention that Mr. Fricke, an electrical engineer, is unable to identify any defect in the design or manufacture of the dryer, other than to state that when the bearing failed, a fire resulted, and therefore the dryer was unreasonably dangerous. (Def.'s Mot. for Summ. J., at 1, P3). Defendant asserts that Plaintiff's expert is limited to testifying "that electricity is capable of causing a fire under certain circumstances." (Def.'s Mot. for Summ. J., at 10, P2). Plaintiff contends that, to the contrary, Mr. Fricke testified that the "dryer drum bearing failed, causing the drum to shift and come in contact with the heating element behind it, grounding [*10] the drum, energizing the heating element, and causing the heating element to overheat and ignite." (Pl.'s Resp. in Opp'n to Def. Electrolux's Mot. for Summ. J., Ex. C, Fricke Aff.). Additionally, Plaintiff argues, Mr. Fricke is of the opinion,

> that if the heating element had been relocated to the lower left hand corner in the subject dryer . . . the February 10, 2004 fire at issue would not have occurred because the dryer drum would not have come into contact with the heating element when the bearing failed.

As to the factors of the risk-utility balancing test, Plaintiff asserts that based upon Fred Pauk's (a former, long-time employee of Electrolux) testimony that he had seen the same type of failure in the dryer before, that the severity of the injury was foreseeable by Electrolux. Additionally, the likelihood of the injury suffered by the Crawfords at the time of the dryer's distribution was foreseeable as Mr. Fricke, testified that an aging dryer will accumulate highly combustible lint which creates an ignition source when the electrical fault occurs. (Def. Electrolux's Mot. for Summ. J., Ex. C). As to factors three through six, Defendant asserts that Mr. Fricke [*11] has not provided evidence that there are reasonable alternative designs available and that its experts, Mr. Pauk and Tom Bajzek, believe that Mr. Fricke's alternative designs are not practicable. Mr. Fricke asserts that other dryer manufacturers, such as Kenmore and Maytag, placed the heating element in a tube in the lower left hand portion of the dryer, which eliminates the potential for ignition. (Pl.'s Resp. in Opp'n, Ex. C, Fricke Aff.). Plaintiff further asserts that because Defendant Electrolux failed to properly locate the heating element within the dryer, this made the dryer not reasonably safe. The jury could infer that since other

manufacturers designed their dryers so that the heating element's placement would not create a likelihood of fire ignition, Electrolux's dryer had a design defect. There is also evidence from experts retained in this matter that the fire originated in the laundry room and its cause was the failure of the drum bearing, which shifted the drum in such a manner that the drum came in contact with the heating element behind it, creating a fire within the casing of the dryer. (Pl.'s Resp. in Opp'n to Def. Electrolux's Mot. for Summ. J., at 14). There is [*12] sufficient evidence for the jury to infer that the defect in the dryer caused the fire, resulting in damage to the Crawfords' personal and real property.

Defendant relies on a Sixth Circuit case in support of its theory that Plaintiff's negligence claim must be dismissed because Plaintiff has failed to set forth a reasonable, practical and available alternative. *See* Peck v. Bridgeport Machs., Inc., 237 F. 3d 614 (6th Cir. 2001). *Peck* is distinguishable from the facts in the instant matter. In holding that the plaintiff failed to make out a prima facie case, the *Peck* Court stated that "an expert who testifies that a product could have been designed differently, but who has never made or seen the alternative design he proposes" can not establish elements three and four of the risk-utility test. *Id.* at 617. Mr. Fricke has specifically mentioned other manufacturers' dryers where the heating element was placed in a different location within the dryer which negated the risk associated with Defendant Electrolux's dryer. Defendant states that Plaintiff cannot rebut the fact that the dryer complied with UL 2158. By Defendant's own statement, this evidence [*13] is merely admissible to establish that the product is in compliance with industry and government standards. *SEE* MICH. COMP. LAWS § 600.2946(1). As such, Defendant's compliance with industry and government standards does not prove that Defendant was not negligent, as "compliance with industry or governmental standards is merely relevant, not conclusive, evidence of reasonable prudent conduct which the factfinder may consider in its determination of negligence." *Hartford Fire Ins. Co. v. Walter Kidde & Co.*, 120 Mich. App. 283, 292, 328 N.W. 2d 29 (*citing Marietta v. Cliffs Ridge, Inc.*, 385 Mich. 364, 369-70, 189 N.W.2d 208; 385 Mich. 364, 189 N.W.2d 208 (1971)). Plaintiff has produced sufficient evidence to create a genuine issue of material fact that Defendant Electrolux negligently designed the Crawfords' dryer.

b. Manufacture

A manufacturer has a duty to manufacture a product to eliminate unreasonable risks of foreseeable injury. *See Fabbrini Family Foods, Inc. v. United Canning Corp.*, 90 Mich. App. 80, 93, 280 N.W. 2d 877 (1979). In order for Plaintiff to establish a manufacturing defect, it must show that 1) [*14] the product was defectively manufactured, 2) the product reached the plaintiff in the same condition as it was when it left the manufacturer and 3) the defect was the proximate cause of the person's injuries or damages. *See Allstate Ins. Co. v. Icon Health & Fitness, Inc.*, 361 F. Supp. 2d 673, 677 (E.D. Mich. 2005)(*citing Prentis v. Yale Mfg.*, 421 Mich. 670, 365 N.W.2d 176 (1984). Plaintiff asserts that the issue "is whether Electrolux designed appropriate fails safe for a bearing failure," and not on the design of the bearing alone as Defendant argues. (Pl.'s Resp. in Opp'n to Def. Electrolux's Mot. for Summ. J., at 6). Defendant's expert, Mr. Pauk, testified that the dryer should have at least a ten year life span, that Electrolux had never incorporated a safety device into the dryer in case of a bearing failure, and that, to his knowledge, the company had never tested the subject dryer's bearing to failure. (Def. Electrolux's Mot. for Summ. J., Ex. H-2, Fred Pauk Tr. at 54-56). The fact that Defendant Electrolux did not have any safety features, and did not perform tests regarding a bearing failure creates a genuine issue of material fact as to [*15] whether the dryer was negligently manufactured. *See Allstate*, 361 F. Supp. 2d at 677(Finding that the plaintiff's evidence that the treadmill, which allegedly causes a fire, lacked a properly functioning safety device created a genuine issue of material fact).

The Court finds that Plaintiff has introduced sufficient evidence to create a genuine issue of fact as to whether Defendant Electrolux was negligent in its design and manufacture of the Crawfords' dryer.

2. Express Warranty (Count III)

Defendant Electrolux argues that Plaintiff's Breach of Express Warranty claim must fail because Plaintiff cannot establish the requisite element of causation because Plaintiff's subrogors admitted that they did not read any of the express warranties delineated in the Owner's Manual. Plaintiff argues that its subrogors failure to read the Owner's Manual should not be controlling, as reliance is not an element needed to create an express warranty. Michigan statutory law provides:

> (1) Express warranties by the seller are created as follows:
>
> > (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the [*16] basis of the bargain creates an express warranty that the goods shall conform to the affirmative or promise.

> (b) A description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

MICH. COMP. LAWS § 440.2313. Plaintiff asserts that the express warranty that Defendant Electrolux breached was that found in the Operating Instructions, stating "that with regular use and care the dryer would provide a long life of service and that the dryer will provide quick and efficient drying of laundered items." (Pl.'s Resp. in Opp'n to Def. Electrolux's Mot. for Summ. J., at 18). This express warranty was breached when the bearing drum failed causing a fire that destroyed Plaintiff's subrogors personal and real property. (*Id.*)

The clear language of the statute requires that the express warranty be "part of the basis of the bargain." Plaintiff's subrogors did not read the materials provided with the subject dryer. Michigan case law has impliedly held that while proof of actual reliance is not necessarily required, some affirmation of fact must be made during the bargaining [*17] period for the plaintiff's claim to fall within the purview of the statute. In *Kepling,* the plaintiff was badly burned after grabbing the handle of a frying pan. The plaintiff asserted "that the words "Cold Handle" stamped on the frying pan represented an express warranty that the handle would stay cold." *Kepling v. Schlueter Mfg. Co.,* 378 F. 2d 5, 6 (6th Cir. 1967). The Sixth Circuit held that the plaintiff failed to establish a prima facie case for breach of express warranty, where the plaintiff could not demonstrate he read any printed representations of 'Cold Handle' on the pan or that similar spoken affirmations were made. *Id.*

Plaintiff urges this Court to hold that post-sale affirmations can be enforced as express warranties, and that reliance is not a necessary element of an express warranty claim. Plaintiff cites as support a New York State case. *See Murphy v. Mallard Coach Co.,* 179 A.D. 2d 187, 193, 582 N.Y.S.2d 528 (N.Y. App. Div. 1992). The *Murphy* Court rejected the defendant-manufacturer's argument that in order to be considered the basis of the bargain, a warranty had to be handed over during the negotiation process. Id. The *Murphy* Court [*18] stated that:

> [T]he fact that [the warranty] was given to plaintiffs at the time they took delivery of the motor home renders it sufficiently proximate in time so as to fairly be said to be part of the basis of the bargain . . . . To accept the manufacturer's argument . . . is to ignore the practical realities of consumer transactions wherein the warranty card generally comes with the goods, packed in the box of boxed items or handed over after purchase of larger, non-boxed goods and accordingly, not available to be read by the consumer until after the item is actually purchased . . . such an interpretation, would, in effect, render almost all consumer warranties an absolute nullity.

Id. While not controlling authority, the Court finds this reasoning persuasive. As such, the Court finds that the Michigan statute does not expressly require reliance. Unlike the facts in *Kepling*, here the express warranty is general and is what would reasonably be expected. In *Kepling,* the plaintiff argued that the 'cold handle' express warranty was breached when the plaintiff's wife suffered severe burns after grabbing the pan's handle when grease in the pan caught on fire. [*19] *Kepling,* 378 F. 2d at 6. A consumer would not ordinarily expect a frying pan's handle to stay cold during cooking. The Crawfords relied on a general warranty that the dryer would perform as it was intended to; as a dryer. The Crawfords failure to read the warranty does not bar Plaintiff's claim under the Michigan statute.

3. Implied Warranty of Merchantability (Count IV)

Defendant argues that the same risk-utility analysis used to determine a manufacturer's liability for a design defect is used for determining whether a manufacturer breached an implied warranty of merchantability. Defendant misstates the law. The Michigan Supreme Court has stated that:

> Since a defective product can reflect negligence in the design or manufacturing process, and can also give rise to a breach of implied warranty, the two theories of liability are often seen as closely related. However, we have noted on several occasions that these indeed are separate causes of action, with different elements . . .the negligence theory generally focuses on the defendant's conduct, . . . while warranty generally focuses upon the fitness of the product, irrespective of the defendant's conduct. [*20]

Lagalo v. Allied Corp., 457 Mich. 278, 287, 577 N.W. 2d 462 (1998)(internal citations omitted). A claim for breach of warranty as to the fitness of a product for its intended purpose, requires the plaintiff to show 1) a defect attributable to the manufacturer, 2) when the product left the defendant's control, and 3) this defect caused the plaintiff's injuries. *See Caswell v. Air. Prods. & Chems., Inc.*, 59 F. Supp. 2d 684, 695-96 (E.D. Mich. 199). A plaintiff is not required to prove a specific defect. *Sundberg v. Keller Ladder*, 189 F. Supp. 2d 671, 676 (E.D. Mich. 2002). Plaintiff has presented sufficient evidence to withstand summary judgment on this issue. There is circumstantial evidence of a defect in that a fire started in the Crawfords' laundry room, inside of the subject dryer, and that the fire might not have occurred if the heating element was relocated or if bearing failure tests had been performed by Defendant. There is no dispute that the fire caused damage to the Crawfords' property.

4. Failure to Warn (Count V)

Under Michigan law, a manufacturer has a duty to warn of dangers associated with the intended [*21] uses or reasonably foreseeable misuses of the product. *Portelli v. I.R. Constr. Prods. Co.*, 218 Mich. App. 591, 554 N.W.2d 591 (1996); *Peck v. Bridgeport Machines, Inc.*, 237 F. 3d 614, 618 (6th Cir. 2001). To prevail on a failure to warn claim, a plaintiff must show that a manufacturer or seller: 1) had actual or constructive knowledge of the alleged danger; 2) had no reason to believe that consumers would know of this danger; and 3) failed to exercise reasonable care to inform consumers of the danger. *Peck*, 237 F.3d at 619. In a negligence claim, the plaintiff is also required to show causation and damages and where causation is lacking, the question of duty to warn need not be addressed. *Id.*

Defendant Electrolux argues since Plaintiff's subrogors did not read the Owner's or Instruction manuals, Plaintiff can not establish the necessary causal relationship between the alleged failure to warn and the fire. Plaintiff counters that the dryer came with Installation and Operating Instructions, an Owner's Guide and labeling on the dryer itself. Plaintiff states that none of the provided literature stated that if the dryer starts to squeak, the dryer [*22] should be taken in for service. As such, it appears that even if Plaintiff's subrogors read the material provided along with the dryer, the needed warning would not have been provided anyway. Plaintiff further argues that Defendant Electrolux's own expert, a former, long-time employee of the company, testified that he had seen the same type of failure in the Electrolux's dryer before. (Dep. of Fred Pauk, at 78-79). Therefore, Plaintiff has established that Defendant Electrolux had "constructive knowledge of the alleged danger." As to the second factor, Plaintiff asserts that Mr. Pauk also testified that the only physical manifestation that there was a problem, was the squeaking noise Plaintiff's subrogors noticed two weeks before the fire. Mr. Pauk further testified that other than the squeaking noise, the dryer was properly working. Due to this, Defendant Electrolux would have no reason to believe that once the dryer began squeaking, the Crawfords would appreciate the danger that a fire would develop. None of the literature provided warned the Crawfords that if the dryer started squeaking, it must be taken in for service because the dryer's drum bearing may fail, which could cause [*23] a fire. Plaintiff has presented sufficient evidence to withstand summary judgment on this claim.

B. Best Buy's Motion for Summary Judgment

Defendant Best Buy argues that under Michigan products liability law, it is not responsible for any harm allegedly caused to Plaintiff's subrogors because a seller other than a manufacturer is not liable for any harm caused by a product, unless the seller fails to exercise reasonable care or if the seller makes an express warranty as to the product. (Def. Best Buy's Mot. for Summ. J., at 6). Defendant Best Buy is not completely correct in its analysis of the applicable Michigan law.

In Michigan, MICH. COMP. LAWS § 600.2947 governs the liability of a non-manufacturer seller of a product:

> (6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless . . . the following is true:
>
> > (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was the proximate cause of the person's injuries.
> >
> > (b) The seller made an express warranty as to the product, the [*24] product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

MICH. COMP. LAWS § 600.2947(6)(a) and (b). Under the statute, a plaintiff can recover only if the retailer 1) failed to exercise reasonable care, or 2) breached an implied or express warranty. *See* *Mills v. Curioni,* 238 F. Supp. 2d 876, 886 (E.D. Mich 2002), *Williams v. KIA Motors Am., Inc.,* 2005 U.S. Dist. LEXIS 40865, *5 (E.D. Mich. 2005).

1. Negligence (Count VI)

With the above in mind, Plaintiff's negligence claim against Defendant Best Buy must fail. In order to establish that Defendant Best Buy failed to exercise reasonable care, Plaintiff must first demonstrate that Defendant was aware of, or should have been aware of the product's defective nature. *See* *Mills,* 238 F. Supp. at 886; *Williams,* 2005 U.S. Dist. LEXIS 40865, at *5. Plaintiff has provided no evidence supporting this essential element. Although Defendant Best Buy delivered and installed the dryer in Plaintiff's subrogors' home, there has been no assertion by Plaintiff that Defendant [*25] Best Buy was negligent in its performance of this service. Plaintiff has only provided Defendant Electrolux's former employee, Fred Pauk's testimony that he had seen the same type of failure in the dryer before. This does not demonstrate that Defendant Best Buy "knew or had reason to know the product was defective." *Mills,* 238 F. Supp. at 886. There is no evidence that Defendant Best Buy's customers had previously requested repairs on the same type of dryer, nor that its customers complained of, or returned the dryer due to the defect. Defendant Best Buy's Motion for Summary Judgment is granted with respect to this claim.

2. Failure to Warn (Count X)

For the same reason that Plaintiff can not establish its negligence claim against Defendant Best Buy, Plaintiff's failure to warn claim will also fail. In order for Plaintiff to prove this claim, it must demonstrate that Defendant Best Buy, 1) had actual or constructive knowledge of the alleged danger; 2) had no reason to believe that consumers would know of this danger; and 3) failed to exercise reasonable care to inform consumers of the danger. *Peck,* 237 F.3d at 619. Since Plaintiff cannot demonstrate [*26] the first element, that Defendant Best Buy had actual or constructive knowledge of the defect in the dryer, Plaintiff can not establish a prima facie case against Defendant Best Buy for failure to warn.

3. Implied Warranty (Count IX)

Notwithstanding Plaintiff's failure to withstand summary judgment on its negligence and failure to warn claims against Defendant Best Buy, Plaintiff has met its burden in regard to its breach of implied warranty claim. When the defendant is a non-manufacturing seller, the analysis of negligence and breach of implied warranty claims diverge. *Id.,* citing *Prentis v. Yale Mfg. Co.,* 421 Mich. 670, 365 N.W.2d 176 (1984). "Because the existence of a defect is generally determined by the negligent conduct of the manufacturer, a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer's conduct is wholly free from negligence. *Hollister,* 201 F. 3d 737. A breach of warranty of merchantability or fitness claim requires Plaintiff to demonstrate that 1) the retailer sold the product in a defective condition; and 2) the defect caused the plaintiff's injury. *Hollister,* 201 F. 3d 737 [*27] (citing *Piercefield v. Remington Arms Co.,* 375 Mich. 85, 133 N.W.2d 129 (2004). As already discussed above, Plaintiff has submitted enough evidence to create a genuine issue of material fact as to whether Defendant Electrolux sold the dryer in a defective condition. Plaintiff's expert testified that if the dryer had been designed differently so that the heating element did not come into contact with the dryer's drum, the fire would not have started. As already stated, there is no dispute that the fire caused damage to Plaintiff's subrogors personal and real property.

4. Express Warranty (Count VIII)

MICH. COMP. LAWS § 600.2947(6)(b) provides for a breach of express warranty claim against a non-manufacturing seller of goods in Michigan. An express warranty is created by a seller by setting forth a promise of affirmation, description or sample with the intent that the goods will conform. *Guaranteed Construction Co. v. Gold Bond Products,* 153 Mich. App. 385, 390, 395 N.W.2d 332 (1986). The existence of an express warranty is typically a jury question, but may provide a question of law for the court if a statement can fairly be characterized [*28] as "sales talk." *Hayes Construction v. Silverthorn,* 343 Mich. 421, 72 N.W.2d 190 (1955). Michigan's express warranty statute provides that:

(1) Express warranties by the seller are created as follows:

> (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmative or promise.
>
> (b) A description of the goods which is made part of the basis of the bargain

> creates an express warranty that the goods shall conform to the description.

MICH. COMP. LAWS § 440.2313 (2004). Plaintiff argues that Defendant Best Buy breached its express warranty by failing to provide a safe dryer free from defect. (Pl.'s Compl, at 9, P47). In its Response to Defendant Best Buy's Motion for Summary Judgment, Plaintiff does not describe where this description was found or how it was the basis of the bargain, instead Plaintiff "reincorporate[d] all of the law and arguments stated in" its Brief in Opposition to Defendant Electrolux's Motion for Summary Judgment to defend against Defendant Best Buy's Motion for Summary [*29] Judgment. (Pl.'s Br. in Opp'n to Def. Best Buy's Mot. for Summ. J. at 7). Without more, this is not enough to create a genuine issue of material fact as to whether Defendant Best Buy breached its express warranty as the Court cannot determine what the exact express warranty was, if it was found on a label on the dryer or if it was among the warranties provided by Electrolux. See Pl.'s Br. in Resp. to Def. Electrolux's Mot. for Summ. J., Ex. A).

C. Strict Liability (Counts II and VII)

Plaintiff asserts strict liability as a basis for relief against both Best Buy and Electrolux. Defendant Electrolux counters that Michigan does not recognize a cause of action under a theory of strict liability. Plaintiff concedes this fact in its Response in Opposition to Electrolux's Motion for Summary Judgment.

Michigan Courts have not adopted a theory of strict liability. *See* *Prentis*, 421 Mich. at 683, *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 32, 538 N.W.2d 325 (1995). In fact, the Michigan Court of Appeals has stated that the addition of a strict liability claim to a cause of action alleging theories of negligence and implied warranty would be unnecessarily [*30] repetitive.

> In Michigan, two theories of recovery are recognized in product liability cases; negligence and implied warranty. Strict liability has not been recognized as a third theory of recovery. If anything, the proofs that would be presented under a strict liability theory in a product case would overlap with the proofs that would be presented under an implied warranty theory. The addition of the third count adds only confusion, not substance.

Johnson v. Chrysler Corp., 74 Mich. App. 532, 535-36, 254 N.W. 2d 569 (1977).

Notwithstanding Michigan's stance on the subject, Plaintiff asserts that the facts of the present matter present a good faith basis for extending products liability law to include recovery on a theory under strict liability. The Court does not agree. The Michigan Courts have been presented with the opportunity to extend the law, and repeatedly refused to do so. This Court will not substitute its judgment as to the appropriateness of extending Michigan's product liability law. This is the province of the State of Michigan's legislature or judiciary. As such, Plaintiff's claims against both Electrolux and Best Buy cannot proceed under [*31] a theory of strict liability.

V. CONCLUSION

Accordingly,

IT IS ORDERED that Defendant Electrolux's Motion for Summary Judgment **[Docket No. 21, filed December 7, 2005]** is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that Defendant Electrolux's Motion for Summary Judgment is GRANTED as to Plaintiff's claim for Strict Liability, Count II.

IT IS FURTHER ORDERED that Defendant Electrolux's Motion for Summary Judgment is DENIED as to Plaintiff's claims for Negligence, including Design and Manufacture, Implied and Express Warranty and Failure to Warn, Counts I, III, IV, and V.

IT IS FURTHER ORDERED that Defendant Best Buy's Motion for Summary Judgment **[Docket No. 19, filed December 7, 2005]** is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that Defendant Best Buy's Motion for Summary Judgment is GRANTED as to Plaintiff's claims for Negligence, Strict Liability, Express Warranty and Failure to Warn; Counts VI, VII, VIII, and X.

IT IS FURTHER ORDERED that Defendant Best Buy's Motion for Summary Judgment is DENIED as to Plaintiff's claim for Implied Warranty, Count IX.

Dated: October 11, 2006

/s/ Denise Page Hood

United States [*32] District Court Judge

LEXSEE

FMR CORPORATION v. BOSTON EDISON COMPANY. MAY COMPANY & another v. BOSTON EDISON COMPANY & another; EMPLOYERS INSURANCE OF WAUSAU, third-party defendant.

S-6169

SUPREME JUDICIAL COURT OF MASSACHUSETTS

415 Mass. 393; 613 N.E.2d 902; 1993 Mass. LEXIS 315

March 3, 1993, Argued
June 3, 1993, Decided

PRIOR HISTORY: [***1] Suffolk. Civil action commenced in the Superior Court Department on October 16, 1985. The case was heard by Robert L. Steadman, J., on a motion for summary judgment. Civil action commenced in the Superior Court Department on March 19, 1990. The case was heard by Robert A. Mulligan, J., on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the cases from the Appeals Court.

COUNSEL: Francis M. Lynch for FMR Corporation.

Thomas D. Burns (Lawrence J. McNally, Jr., with him) for Boston Edison Company.

Ralph C. Copeland for May Company & another.

Leonard F. Zandrow, Jr. (Robert M. Hacking with him) for F.L. Kelley, Inc.

Alice Olsen Mann for Employers Insurance of Wausau.

JUDGES: Present: Liacos, C.J., Lynch, O'Connor, & Greaney, JJ.

OPINION BY: LYNCH

OPINION

[*394] [**903] LYNCH, J. The plaintiffs in these consolidated cases seek recovery for physical damage on counts for negligence and breach of contract. They appeal from summary judgments for the defendants, Boston Edison Company (Edison) and F.L. Kelley, Inc. (Kelley); Edison in turn appeals from the dismissal of its claim against Employers [***2] Insurance of Wausau (Wausau) for refusing to defend. We transferred the cases here on our own motion. [1] We affirm the summary judgments, but reverse the dismissal of Edison's third-party complaint.

1 The cases were consolidated in the Appeals Court for briefing and oral argument on a joint motion of the parties.

We summarize the facts before the motion judges. The first case revolves around an electrical power outage in the financial district on June 13, 1983, which lasted for three days. FMR Corporation (FMR), a financial management and investment firm, had its operations interrupted and alleges that it sustained damages in excess of $ 1,000,000 for lost income and increased costs of doing business during the power outage. FMR alleged that Edison was negligent, breached implied and express warranties, and breached the terms and conditions of its tariff by failing to provide uninterrupted electrical power. Finding that FMR's damages were solely economic, the judge granted summary judgment for Edison.

[*395] The second [***3] case arises from a power outage on April 4, 1987. Kelley was working on Edison electrical lines along Huntington Avenue in Boston pursuant to a contract with Edison. As a result of Kelley's alleged negligence, electrical service to the Boston stores of Wm. Filene's Sons Co. and Filene's Basement, Inc., (stores), was interrupted necessitating the closing of the stores and resulting in a loss of business transactions. The stores asserted negligence and breach of contract claims against Edison and a negligence claim against Kelley. Edison and Kelley asserted cross claims against each other for indemnity and contribution. Edison also asserted a third-party claim against Wausau for indemnity and to force Wausau to defend it in the underlying action. The judge granted summary judgment for Edison and Kelley against the stores, and dismissed the cross claims and the third-party claim.

1. *Negligence claims for economic damage.* We have recently affirmed that purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage. *Garweth Corp.* v. *Boston Edison Co., ante* 303 (1993). We see no reason to abandon this [***4] long-standing rule. See *Bay State-Spray & Provincetown S.S., Inc.* v. *Caterpillar Tractor Co.,* 404 Mass. 103, 107, 533 N.E.2d 1350 (1989); *Stop & Shop Cos.* v. *Fisher,* 387 Mass. 889, 893-894, 444 N.E.2d 368 (1983); *Marcil* v. *John Deere Indus. Equip. Co.,* 9 Mass. App. Ct. 625, 630-631 (1980). We continue to align ourselves with the majority of jurisdictions which have considered the issue. See *East River S.S. Corp.* v. *Transamerica Delaval, Inc.,* 476 U.S. 858, 865-875, 90 L. Ed 2d 865, 106 S. Ct. 2295 (1986); *Barber Lines A/S* v. *M/V Donau Maru,* 764 F.2d 50, 51-53 (1st Cir. 1985); *State ex rel. Guste* v. *M/V Testbank,* 752 F.2d 1019, 1020 (5th Cir. 1985), cert. denied sub nom. *White* v. *M/V Testbank,* 477 U.S. 903, 91 L. Ed. 2d 562, 106 S. ct. 3271 (1986); *Canal Elec. Co.* v. *Westinghouse Elec. Corp.,* 756 F. Supp. 620, 629 (D. Mass. 1991), modified, 973 F.2d 988 [**904] (1st Cir. 1992); Restatement (Second) of Torts § 766C (1979).

2. *Contractual right to recover damages.* The plaintiffs argue [***5] that they are entitled to prevail on their contract claims [*396] that Edison breached its contract to supply electricity and is, therefore, liable. As support for this theory, they rely on the tariff filed by Edison with the Department of Public Utilities as creating by implication a contract with Edison. Condition number 14 of the tariff contains an exculpatory provision exempting Edison from liability for power outages, interruptions, or inadequate supplies of electricity if Edison's failure "is without wilful default or gross negligence." Even if, as the plaintiffs contend, Edison committed gross negligence, there is nothing in the tariff that creates a right to recover for economic loss absent physical damage. The judge below correctly reached the conclusion that the principles precluding recovery in negligence for economic losses bar this action and "couching the allegations in terms of breach of contract . . . does not change the prohibition." See *Stop & Shop Cos.* v. *Fisher, supra* at 893-894; *New England Power Co.* v. *Riley Stoker Corp.,* 20 Mass. App. Ct. 25, 35, 477 N.E.2d 1054 (1985); *Marcil* v. *John Deere Indus. Equip, Co.,* 9 Mass. App. Ct. 625, 632 n.6 (1980). [***6] Furthermore, it must be understood that the extensive legislative regulation of Edison's rates and practices takes the furnishing of electricity out of the realm of contract law. *Boston Edison Co.* v. *Boston,* 390 Mass. 772, 776-777, 459 N.E.2d 1231 (1984). The tariff in question does not create a contract. The judges correctly granted summary judgment.

3. *Dismissal of the third-party claim.* Although no motion was before the court, in ruling on the summary judgment motion the budge dismissed for mootness Edison's third-party claim against Wausau. Edison filed a timely appeal. Edison did not move for reconsideration or relief from judgment. Since the claim was dismissed by the judge sua sponte without prior notice, Edison did all it was required to do to preserve the issue. The entry of summary judgment did not make moot the issue whether Wausau was obliged under Kelley's insurance policy to provide Edison with a defense. The dismissal of the third-party claim is reversed and remanded to the Superior Court for further proceedings.

So ordered.

LEXSEE

Elaine M. Fuller v. Banknorth Mortgage Company, Banknorth Group, Inc., and First Vermont Bank & Trust

SUPREME COURT DOCKET NO. 01-133

SUPREME COURT OF VERMONT

173 Vt. 488; 788 A.2d 14; 2001 Vt. LEXIS 374

October 29, 2001, Filed

SUBSEQUENT HISTORY: [***1] The Name, Docket Number, and Opinion Text of this Case has been Corrected by the Court December 31, 2001.

PRIOR HISTORY: APPEALED FROM: Essex Superior Court. DOCKET NO. 8-2-96ExCv. Trial Judge: Merideth Wright.

DISPOSITION: Affirmed.

JUDGES: Jeffrey L. Amestoy, Chief Justice, John A. Dooley, Associate Justice, Denise R. Johnson, Associate Justice, Marilyn S. Skoglund, Associate Justice.

OPINION

[**14] [*488] ENTRY ORDER

Plaintiff Elaine Fuller appeals the judgment of the superior court in favor of defendant Banknorth Mortgage Company on her claim for fraud. Fuller argues that the trial court misapplied the law concerning fraudulent concealment and erroneously determined that a release she signed covered the actions of Banknorth. We affirm.

Fuller argues that the trial court erred as a matter of law and does not contest the factual findings of the court. The undisputed factual findings of the court are as follows. On September 23, 1993, Fuller entered into a purchase and sale agreement to buy a nine-room house in Concord that dated from roughly 1860. It was her first purchase of a home. The purchase and sale agreement was contingent on, among other things, Fuller receiving financing for the purchase. It contained no building inspection contingency, however.

The following day, Fuller contacted [***2] a loan originator for Banknorth about financing for the home. In the course of their meeting, the loan originator discussed the various options available to Fuller as a low-income, first-time home buyer, including applying for a Vermont Housing Finance Agency (VHFA) loan guaranteed by the federal Farmers Home Administration (FHA). Fuller filled out a loan application and wrote a check to cover both the application fee and a loan appraisal. The following week, the loan originator informed Fuller that her loan application [**15] was being placed with the VHFA, and the loan would be guaranteed by the FHA if approved. She also requested that Fuller send her additional monies to cover a building inspection which was required as part of the loan application process with VHFA and FHA. The loan originator explained that VHFA and FHA needed information on the value of the security as well as estimates regarding needed repairs, funds for which would be potentially included in the loan amount. Fuller was initially upset that she had to pay for what she viewed as a "second inspection," but agreed when the loan originator [*489] explained that it was a necessary part of the loan application process.

Fuller [***3] requested to the loan originator that she be present at the inspection so she could receive the estimates for the repairs. Unfortunately, the realtor who had shown Fuller the house set up the inspection and not the loan originator. The realtor did not notify Fuller of the inspection, and, therefore, she was not present for it. The inspection was performed on October 18, but without either the electricity connected or the water turned on. The inspector filled out a form indicating whether certain items were in "good," "average," or "poor" condition, and included additional remarks. The report was provided to the loan originator who forwarded it to the VHFA/FHA. She also discussed the results with the inspector who indicated he thought that the items marked "poor" should be repaired prior to the transaction occurring.

The loan originator contacted Fuller and informed her that both the appraisal and inspection had been completed. She told her that certain items needed to be

repaired before a loan would be approved. Fuller and the seller executed an addendum to the purchase and sale agreement that extended the closing date and provided that the needed repairs would be done before closing. [***4] Fuller took the fact that the loan approval process would go forward once the needed repairs were done to mean that the house had "passed" the building inspection. She never requested a copy of the inspection report.

On November 19, FHA provided the first conditional commitment for the loan, conditioned on the necessary repairs being done. The closing was scheduled for January 24, 1994. Fuller and several of her friends performed many of the repairs themselves because of the short timeline. The day before the closing, the appraiser reappraised the property. The appraisal still exceeded the loan amount, and the loan was approved with the closing occurring as scheduled. As is the custom with such loans, the loan was assigned to VHFA, and thereafter Banknorth merely serviced the loan on behalf of VHFA.

In the ensuing months, Fuller started to experience numerous problems with the home, including problems with the wiring, questions about the soundness of the foundation, and problems with the well pump. Because of the expenses related to these problems, Fuller had trouble meeting her monthly loan payments. She also was without work or income for a period of time following her purchase [***5] of the house. Eventually, she negotiated an agreement with VHFA in which the organization accepted a deed in lieu of foreclosure, because of her inability to make her loan payments. She vacated the home in February 1996.

Fuller initially brought suit against the building inspector for negligence. Fuller later added Banknorth as a defendant and stipulated to the dismissal of her claims against the building inspector, eventually adding a claim for fraud against Banknorth. The parties proceeded to trial only on the fraud claim. Following a bench [**16] trial, the trial court entered judgment in favor of Banknorth. Fuller appeals to this Court.

Fuller's primary argument is that, despite the trial court's conclusion that Banknorth did not affirmatively misrepresent the results of the building inspector's report, the trial court failed to adequately address the alternative basis for a claim of fraud: fraudulent concealment. Fuller argues that Banknorth failed to disclose fully the details of the inspection results, thereby fraudulently inducing her to enter into the loan transaction. She argues that she was misled into believing, by Banknorth's silence, that the inspection found that the electrical, [***6] water and wastewater disposal systems were in good working order when, in fact, those systems were never [*490] really examined because neither the electricity nor the water were turned on.

Our case law establishes that, in order to state a claim for fraud based on fraudulent concealment, a plaintiff must demonstrate: (1) concealment of facts, (2) affecting the essence of the transaction, (3) not open to the defrauded party's knowledge, (4) by one with knowledge and a duty to disclose, (5) with the intent to mislead, and (6) detrimental reliance by the defrauded party. See Lewis v. Cohen, 157 Vt. 564, 568, 603 A.2d 352, 354 (1991) (outlining the elements of fraud by affirmative misrepresentation); Silva v. Stevens, 156 Vt. 94, 102-03, 589 A.2d 852, 857 (1991) (listing the elements of fraud and the elements of fraudulent concealment); Sutfin v. Southworth, 149 Vt. 67, 69-70, 539 A.2d 986, 988 (1987) (describing fraudulent concealment and explaining that it is tantamount to an affirmative misrepresentation). We have stressed the essential nature of the duty to disclose to a claim for fraudulent concealment in numerous cases. Roy v. Mugford, 161 Vt. 501, 510, 642 A.2d 688, 693 (1994); [***7] Silva, 156 Vt. at 103, 589 A.2d at 857; Sutfin, 149 Vt. at 69-70, 539 A.2d at 988; White v. Pepin, 151 Vt. 413, 416, 561 A.2d 94, 96 (1989). Additionally, in order to establish a claim for fraud, a plaintiff must meet a higher burden of proof: that of clear and convincing evidence. Hughes v. Holt, 140 Vt. 38, 41, 435 A.2d 687, 689 (1981). We will assume for the sake of argument that Fuller managed to establish all of the other elements of fraudulent concealment, contrary to the trial court's conclusions. But with the exception of the bald statement on the first page of her brief that "although the inspection was required by [VHFA and FHA] to process the loan, [she] was an intended third party beneficiary," [1] Fuller's brief fails to address or acknowledge the requirement that Banknorth have a duty to disclose.

1 Fuller does not include a copy of the agreement between Banknorth and the building inspector that she claims establishes her as a third-party beneficiary. "The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the original contracting parties' intention." McMurphy v. State, 171 Vt. 9, 16, 757 A.2d 1043, 1049 (2000) (examining contract to determine whether plaintiffs' daughter was a third-party beneficiary of agreement).

[***8] The trial court noted that Banknorth had not assumed a role beyond that of mortgagee. Furthermore, the court determined that the inspection was undertaken for the benefit of VHFA and FHA to determine whether to approve Fuller's loan application and on what conditions. The trial court went on to conclude that in

doing so, Banknorth was not providing any guarantees about the condition of the home to Fuller. Cf. Baker v. Surman, 361 N.W.2d 108, 111 (Minn. Ct. App. 1985) ("[A] buyer cannot rely upon an FHA appraisal as a warranty of the value or condition of the home. The primary and predominant [**17] objective of the FHA appraisal system is the protection of the government and its insurance funds.").

In similar circumstances, we have held that a lender does not take on any duty to the borrower when it undertakes an investigation for its own benefit. Hughes, 140 Vt. at 40, 435 A.2d at 688 (on claim for negligence against mortgagee bank in performing its appraisal, mortgagor failed to establish that bank owed mortgagor duty of care); see also McGee v. Vermont Fed. Bank, 169 Vt. 529, 530, 726 A.2d 42, 44 (1999) (mem.) (noting, on claim that bank breached [***9] a fiduciary duty by failing to disclose to mortgagors that insurance required by bank had lapsed, "record revealed nothing but a debtor-creditor relationship between the parties" and fiduciary relationship was not born of such an arrangement); [*491] Rzepiennik v. U.S. Home Corp., 221 N.J. Super. 230, 534 A.2d 89, 93 (N.J. Super. Ct. App. Div. 1987) ("neither the record nor law nor reason supports an inference that [mortgagee], by demanding a certificate of occupancy and inspection certificates, undertook any duty or obligation to inspect the property on behalf of the [mortgagors] or to warrant its condition"). We noted in Hughes, "although there are cases where a bank goes beyond its role as mortgagee and gets involved in a capacity beyond that of a mere lending agency so that a duty relationship analogous to that of a seller or broker may come into being, this is not such a case." Hughes, 140 Vt. at 40, 435 A.2d at 688 (emphasis added; internal citation omitted). Given that the trial court made a similar determination in this case, we discern no basis for imposing a duty to disclose on Banknorth. [2] Cf. Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 283 Cal. Rptr. 53, 56-57 (Ct. App. 1991) [***10] (noting when bank's role does not extend beyond that of conventional lender of money, bank owes no duty such as a "duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe investment"); see also Raynor v. United States, 604 F. Supp. 205, 207 (D.N.J. 1984) (on claim that mortgage company breached its contractual and fiduciary duty by misrepresenting that it had done a thorough inspection of home, court noted that mortgage company inspected property solely for the purpose of determining its adequacy as collateral and therefore plaintiff failed to demonstrate it violated any duty to her); Block v. Lake Mortgage Co., 601 N.E.2d 449, 451-52 (Ind. Ct. App. 1992) (on constructive fraud claim, court affirmed trial court's conclusion that no fiduciary relationship existed between debtor and creditor).

> 2 Courts have noted the policy considerations that oppose the imposition of a duty of care on lenders in the mortgage context. Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 283 Cal. Rptr. 53, 59 (Cal. Ct. App. 1991); Denison State Bank v. Madeira, 230 Kan. 684, 640 P.2d 1235, 1243-44, 230 Kan. 815 (Kan. 1982). If mortgagees assumed a duty to the mortgagor, heretofore not contemplated, when they undertook such evaluations of collateral as building inspections and appraisals, it would increase the risk undertaken by the mortgagees and ultimately result in an increase in the cost of applying for a mortgage.
>
> See Nymark, 283 Cal. Rptr. at 59; Denison, 640 P.2d at 1243-44. The cost increase would raise the barrier to home ownership.

[***11] In the absence of a duty to disclose on the part of Banknorth, Fuller cannot prevail on a theory of fraudulent concealment. Therefore, the trial court properly granted judgment in Banknorth's favor on Fuller's claim for fraud.

Because we determine that the trial court did not err by failing to enter judgment in Fuller's favor on her claim of fraud, we need not address her argument that the trial court erred in ruling that a [**18] release Fuller executed in favor of VHFA also covered Banknorth. We note, however, that Fuller appears to misconstrue the statement, interpreting it to give Banknorth a defense against her fraud claim. In fact, the trial court merely noted "[Fuller]'s release of the VHFA's agents operated to release [Banknorth] from any claims in this action that accrued after the assignment of the loan," i.e., any claims that accrued post-closing. Fuller's claim for fraud was based on the acts of Banknorth's loan originator prior to the closing and prior to the assignment of the loan to VHFA. Furthermore, earlier in its decision, the trial court explicitly states, "prior to [the] assignment . . . [Banknorth] was not acting as an agent of the VHFA in processing [Fuller]'s [***12] application." If Banknorth was not acting as an agent at the time of the alleged fraud, the court [*492] could not hold that the release covered the claim.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

LEXSEE

GENESIS BIO-PHARMACEUTICALS, INC., Plaintiff, v. CHIRON CORPORATION, et al., Defendants.

Civil Action No. 98-2445

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2000 U.S. Dist. LEXIS 21852

August 30, 2000, Decided
August 31, 2000, Filed; August 31, 2000, Entered

SUBSEQUENT HISTORY: Affirmed by Genesis Bio-Pharmaceuticals, Inc. v. Chiron Corp., 2002 U.S. App. LEXIS 749 (3d Cir. N.J. Jan. 10, 2002)

DISPOSITION: [*1] Defendant's motion to dismiss for lack of personal jurisdiction denied, and defendants' motion to dismiss complaint granted.

COUNSEL: For GENESIS BIO-PHARMACEUTICALS, INC., plaintiff: CHARLES D WHELAN III, NEW BRUNSWICK, NJ.

For CHIRON CORPORATION, CHIRON BEHRING GMBH & CO., defendants: ROBERT CARL EPSTEIN, DUANE MORRIS LLP, Newark, NJ.

For CHIRON CORPORATION, CHIRON BEHRING GMBH & CO., cross-claimants: ROBERT CARL EPSTEIN, DUANE MORRIS LLP, Newark, NJ.

JUDGES: Katharine S. Hayden, U.S.D.J.

OPINION BY: Katharine S. Hayden

OPINION

KATHARINE S. HAYDEN, U.S.D.J.

This matter has come before the Court upon the motions of defendants, Chiron Corporation and Chiron Behring GmbH & Co., for dismissal of all claims in the complaint asserted against them.

PROCEDURAL HISTORY

On March 9, 1998 plaintiff Genesis Bio-Pharmaceuticals, Inc. (Genesis) filed a state lawsuit in Bergen County against Chiron Corporation (Chiron), Hoechst AG (Hoechst), Chiron Behring GmbH & Co. (Chiron Behring), and Biological and Popular Culture, Inc (BioPop). Genesis alleged that it had an agreement for exclusive distribution [*2] rights of a rabies vaccine, and demanded specific performance and compensatory and punitive money damages on various grounds. The complaint alleged a distribution agreement had been reached with Chiron and Chiron Behring, and asserted against these defendants claims for breach of contract (First Count) and breach of the implied duty of good faith and fair dealing (Second Count), and for wrongful termination under the New Jersey Franchise Practices Act (Sixth Count). Against Hoechst, Chiron and Chiron Behring the Complaint alleged fraud and civil conspiracy (Third and Eighth Counts) and violations of the New Jersey Consumer Fraud Act (Seventh Count). Finally, against Chiron and BioPop the complaint sought relief for tortious interference (Fourth and Fifth Counts respectively).

Chiron removed the action to federal court and filed a motion to dismiss the action under the "first filed" doctrine or in the alternative to transfer venue to California, where it had filed an action for declaratory relief against Genesis' president Jerrold Grossman. After oral argument, this court denied Chiron's motion, learning that the district judge in California had dismissed Chiron's suit for failure [*3] to effect timely service of process.

Thereafter defendants filed a second round of motions. Hoechst moved to dismiss the complaint as to it for lack of personal jurisdiction (Rule 12(b)(2)) and failure to state a claim upon which relief can be granted (Rule 12(b)(6)). Chiron and Chiron Behring also moved to dismiss, but only for failure to state a claim. In support of their position, they adopted the arguments set forth by Hoechst asserting that Genesis' claims are barred by the parol evidence rule. In its opposition brief, Genesis

indicated that it was withdrawing the Seventh Count of the Complaint that alleged violations of the New Jersey Consumer Fraud Act, and when the parties appeared for oral argument, Genesis represented that once it received an affidavit as to certain facts it would be dismissing its claims against BioPop (Fifth Count), which it eventually did.

After oral argument, the court granted Hoechst's motion to dismiss for lack of personal jurisdiction, and reserved on those motion arguments advanced by Chiron and Chiron Behring pending further briefing. This opinion addresses these remaining defendants' arguments that the complaint must be dismissed as follows: as [*4] to Chiron Behring, for lack of personal jurisdiction; and as to Chiron and Chiron Behring (the Chiron defendants) on grounds that Genesis' claims are barred by the parol evidence rule and so the complaint fails to state a claim against them upon which relief can be granted (adopting the argument advanced by Hoechst in its motion, which was not ruled upon because Hoechst won on grounds that the court lacked personal jurisdiction over it). Additionally, because of the position Genesis took in arguing for personal jurisdiction over Hoechst, the Chiron defendants contend that the doctrine of judicial estoppel precludes Genesis' claims against them on any theory of contract liability. Finally, because this court dismissed first Genesis' claims and thereafter Chiron's cross-claims against Hoechst, the Chiron defendants argue that F.R.Civ.P. 19 requires dismissal of the complaint in the absence of the party who started the controversy.

FACTUAL BACKGROUND

Chiron is a health company headquartered in Emeryville, California that manufactures vaccines and other pharmaceutical products. Plaintiff Genesis is a distributor of health care products located in Tenafly, New Jersey. Around [*5] 1989 or 1990, Genesis began doing consulting work for defendant Hoechst AG [1], a German health care company, in the hopes of becoming the U.S. distributor of Hoechst's rabies vaccine, known as Rabipur or RabAvert. Around February 1996, Hoechst transferred its vaccine business to Chiron Behring GmbH & Co (Chiron Behring)--a limited liability partnership formed between Chiron and Hoechst and located in Marburg, Germany--and Chiron was given control of decisions concerning Chiron Behring operations, such as distribution of vaccines. After learning about the transfer and recognizing its interests were being ignored by these entities, Genesis demanded compensation for its consulting services.

1 Hoechst is named in the suit as the successor to Behringwerke AG which was the corporate entity which dealt with Genesis in the matters at issue here. Behringwerke AG was merged with and into Hoechst on July 31, 1997. (Amended Complaint, P4.) References to Hoechst refer to Hoechst AG and/or Behringwerke AG.

On April 30, 1996, Genesis' [*6] president Jerrold Grossman met with Chiron representatives to discuss a potential distributor relationship. It is Chiron's contention that no agreement was reached then--or ever. On June 27, 1996 Grossman and W. Michael Garner, Genesis' attorney, met with Hoechst executives and attorneys in Frankfurt, Germany, and devised a settlement agreement whereby Hoechst's payment of $ 380,000 to Genesis released Hoechst from "any and all claims which Genesis has, may claim to have or may claim to have in the future relating in any way to any and all relationships between the Parties, for all time in which the Parties have had a relationship."

The settlement agreement further provided that Hoechst would use reasonable and diligent efforts to assist Genesis in "negotiating and concluding" an agreement with Chiron/Hoechst for the distribution of certain Chiron products. Hoechst's assistance in negotiating such an agreement, however, was subject to "the understanding that Chiron has strategic leadership of the joint venture." [2] The third and last paragraph of the agreement is a complete integration clause stating that the agreement "contains the entire agreement of the parties with respect [*7] to the subject matter hereof, and all prior understandings, discussions and representations are hereby merged herein."

2 The underlined portion was a handwritten correction, replacing the words "market authority," that the parties initialed.

Genesis maintains that it was induced to enter into the settlement agreement by the representation of Hoechst that it had authority to negotiate on behalf of Chiron. It states that Hoechst "began the meeting by darkening the conference room and projecting onto a screen oversized enlargements of memoranda prepared by Chiron that proposed, as a resolution of the parties' dispute, that Chiron grant Genesis certain distribution rights to RabAvert and other vaccines." (Complaint P21.) In the memoranda, Chiron wrote to Hoechst:

> -- *May 30, 1996*
>
> Thank you for a copy of the recent correspondence from Dr. Grossman at Genesis Biopharmaceutical to Behringwerke concerning distributorship of the Rabipur rabies vaccine. Per a discussion last week in Emeryville

between Behringwerke [*8] and Chiron concerning the relationship with Genesis Biopharmaceuticals, Chiron Biocine would be prepared to:

i. sell Genesis all Chiron vaccines, including rabies vaccine, at a price equal to the "best" distributor price (regardless of volume) for a 5 year period

ii. work with Genesis to "bid" on contracts for rabies vaccine. This would not be an exclusive arrangement but we would offer Genesis a wholesale net price equivalent to the "best" price offered for a specific contract to any distributor.

-- *June 21, 1996*

As part of our discussions, Chiron has offered to sell Genesis Biopharmaceutical the complete line of Chiron Biocine vaccines at the best price offered to vaccine distributors in the U.S. In addition, we would work with Genesis Biopharmaceutical on "bid requests" from large purchasers with Genesis Biopharmaceutical receiving a price on individual bids equal to the best price given to any other vaccine distributor or wholesale for that bid.

After the Frankfurt meeting, around July 1996, Grossman traveled to California to discuss a distributorship with Chiron. According to the Complaint, Chiron failed to meet with him, refused to respond to Grossman's [*9] confirmation of an agreement with it, and asserted that Hoechst had "no authority to speak or negotiate on behalf of Chiron or represent Chiron in any way." (Complaint P23.) In September 1996, and to Genesis' chagrin, Chiron entered into an agreement with BioPop, a Virginia corporation with its principal place of business in Virginia, to distribute Chiron's vaccines through BioPop's subsidiaries.

DISCUSSION

I. Chiron Behring's Motion to Dismiss the Complaint for Lack of Personal Jurisdiction

The issue of personal jurisdiction was the focus of much briefing and a long and vigorous oral argument before this court, and in the end Hoechst was let out of the case because plaintiff failed to demonstrate that specific jurisdiction exists over that defendant. There is no need to revisit the theories and contentions of the parties on that subject; the issue here is why Chiron Behring stands in any different position than Hoechst.

Chiron Behring describes itself as "a joint venture formed under German law" between Chiron and Behringwerke, A.G., a German company located in Germany which produces and sells a rabies vaccine. As indicated, fn.1 above, Hoechst is a successor [*10] to Behringwerke. Plaintiff refers to Chiron Behring as "the Joint Venture," and states that after plaintiff had completed extensive market research and other efforts to pave the way for the introduction of the new rabies vaccine into the U.S. market, Hoechst reneged on its representations and "announced to Genesis that it had decided to form a joint venture . . . with Defendant Chiron Corporation pursuant to which Chiron would distribute [Hoechst's] vaccine products." Plaintiff's Brief in Opposition to Chiron Behring's Motion at p. 2.

Chiron Behring argues that the allegations against it are "indistinguishable" from those asserted against Hoechst and that its liability is "derivative only, based upon the claim that Hoechst acted on Chiron Behring's behalf," Reply Brief at p. 4, and so the law of the case precludes further examination of the issue. According to the Declaration of Jerrold Grossman, the Joint Venture was to be the manufacturer of the vaccines and Chiron was to be the intermediary distributor in the United States, but because the exact arrangements between the two Chiron entities had not been finalized, the agreement with Genesis was with both of them so that the Joint [*11] Venture could not circumvent obligations Chiron undertook for the benefit of Genesis. See plaintiff's Brief in Opposition to Chiron Behring's Motion at pp. 4-5.

One could argue either way on the issue of whether Chiron Behring should stay in the mix as an appendage of Chiron Corp. or be dismissed based on its identification with the now absent Hoechst. As a practical matter, given Chiron Behring's focal role as manufacturer of the rabies vaccine, a dismissal based on the law of the case would invite the argument that plaintiff's lawsuit must fail against Chiron Corp. standing alone. Because this opinion addresses the merits of the Chiron defendants' arguments, all these arguments are made on behalf of both Chiron defendants and for the same reasons, and the same attorney represents both entities, it is unnecessary to entertain the procedural niceties raised by the jurisdictional dispute between Genesis and Chiron Behring, particularly where the latter has not directly answered the arguments of Genesis about how it differs from Hoechst in the landscape of this lawsuit. Chiron Behring's motion to dismiss for lack of personal jurisdiction is denied.

[*12]

At oral argument there was a brief skirmish over the theory advanced fully in these papers that by committing to the argument that Hoechst was subject to specific jurisdiction in New Jersey because of intentional fraud it committed in its dealing with Genesis, Genesis lost the ability to assert that any enforceable agreement existed with the Chiron defendants. The misrepresentation Hoechst made was as to its authority to bind the Chiron defendants, the argument goes, so how can these defendants be held liable for breaching an agreement Hoechst falsely represented it could make on their behalf?

Of course the key to prevailing on this argument is proof that Genesis is in fact seeking to gain an advantage by taking a position inconsistent with a prior position, thus running afoul of the doctrine of judicial estoppel. Linan-Faye Contr. Co. v. Housing Auth., 49 F.3d 915 (3rd Cir. 1995). Plaintiff argues this isn't so, and that judicial estoppel does not preclude it from advancing inconsistent claims or defenses in the same action, relying on distinctions made in AFN v., Schlott, Inc., 798 F. Supp. 219, 227 fn. 12 (D..N. J. 1992). [*13] Genesis contends it had no choice but to plead in the alternative, because while Hoechst represented it was authorized to enter into an agreement on the Chiron defendants' behalf, the latter have never specified that either Hoechst lied or they reneged. So, Genesis maintains, the complaint advances alternative theories "based on the conflicting facts." Either Hoechst had no authority but misrepresented it did; or Hoechst and the Chiron defendants agreed that Hoechst would misrepresent that it had authority while they knew that Chiron would never perform under the agreement; or in fact Hoechst *was* authorized and thereafter all three defendants reneged on and breached the agreement. Plaintiff's Opposition Brief at pp. 8-9. Clearly this contention focuses on the assertions contained in the complaint.

In response the Chiron defendants argue that the position Genesis took was not adopted merely in pleadings, but was vigorously asserted in connection with the dispositive motion brought by Hoechst. The court agrees that the assertion by Genesis that Hoechst was deliberately lying and that this conduct formed the basis for specific jurisdiction was fundamental to Genesis' position, Genesis [*14] having conceded there is no general jurisdiction over Hoechst. But since judicial estoppel is a fact-driven, equitable doctrine invoked by the court at its discretion, McNemar v. The Disney Store, Inc., 91 F.3d 610, 617 (3rd Cir. 1996), it is reasonable to inquire whether the Chiron defendants are actually aggrieved. Could they instead be seeking to profit doubly by Genesis' losing its jurisdictional argument against Hoechst? After all, in making its argument Genesis wasn't commenting on what the Chiron defendants did, but what Hoechst did; and going forward now with claims that Chiron defendants committed tortious interference or may have combined with Hoechst to commit fraud isn't taking an inconsistent position vis a vis Chiron Corp. or Chiron Behring.

The court recognizes that judicial estoppel trumps privity, and that it can apply even when the challenged position turns out to be rejected. But in the end, resolving this issue is not difficult given the *gravitas* of this equitable doctrine. As McNemar and cases it cites make clear, there are two considerations for the court when judicial estoppel is invoked: "(1) Is the party's present position inconsistent [*15] with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith--i.e., 'with intent to play fast and loose' with the court?" 91 F.3d at 618 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3rd Cir. 1996)). Both prongs must be met because "the doctrine of judicial estoppel serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts." McNemar at 616. This court is not persuaded that its integrity is at stake, nor that Genesis is playing "fast and loose" or otherwise operating in bad faith in its claims against the Chiron defendants and will deny the motion to dismiss the complaint on grounds of judicial estoppel.

III. The Chiron Defendants' Motion to Dismiss Based on Its Remaining Arguments - the Effect of the Absence of Defendant Hoechst (asserting F. R. Civ. P. 19) and the Parol Evidence Rule (failure to state a claim under F. R. Civ. P. 12(b)(6))

The first of the foregoing arguments also rests on equitable considerations, this time those set forth in F. R. Civ. P. 19(b). The Chiron defendants argue that [*16] Hoechst is an indispensable party and that its actions created the dispute among the parties, which is why they sought to file cross-claims against Hoechst (unsuccessfully, as they point out in making this point). Requiring the Chiron defendants to go forward now, in Hoechst's absence, prevents them, they contend, from "obtaining recourse against the single party responsible for this suit and who, if Genesis' allegations are proven, bears exclusive liability." Chiron Defendants' Moving Brief at p. 24. They further contend that should the case proceed they will be required to defend an action in which all the key witnesses are abroad and to reconstruct the events of the Frankfurt meeting attended only by representatives of Hoechst and Genesis. All of this, they protest, "would be unjust, prejudicial and wrong." Id.

The Chiron defendants are right about one thing: the genesis of this lawsuit is, beyond peradventure, what happened at the Frankfurt meeting that generated the

settlement agreement between Hoechst and Genesis which required, among other things, that Hoechst pay Genesis $ 380,000.00 (which it did), and that Hoechst would use reasonable and diligent efforts to assist Genesis [*17] in negotiating and concluding an agreement with the Chiron defendants for the distribution of the rabies vaccine, subject to "the understanding that Chiron has strategic leadership of the joint venture" (which, interestingly, Genesis does not appear to examine). Armed with that agreement Jerrold Grossman claims in his Declaration, para. 3, that he "*attempted to conclude* the distribution agreement with representatives of Chiron as is detailed in Paragraph 23 of the Complaint" (emphasis added). He describes making "repeated telephone calls to discuss the terms of the agreement" with an employee of Chiron who, Grossman asserts, had represented himself as speaking for Chiron Behring as well as Chiron. He points out that correspondence and dealings over 1996 and 1997 between him and Chiron employees referred to the joint venture as "Chiron" or "Chiron Vaccines." Finally, Grossman states, "the Joint Venture and Chiron . . . repudiated the existence of any agreement with Genesis." Id. In support, Grossman appends a series of letters and faxes detailing efforts among himself and Chiron and Chiron Vaccines to reach a distribution arrangement. The court is constrained in light of all [*18] of this to observe that the Chiron defendant's Rule 19 argument pales in comparison to the more substantive position they take: that the complaint fails to state a claim against them.

In support, the Chiron defendants have adopted the position briefed by Hoechst that the parol evidence rule bars plaintiff's claims that during the Frankfurt settlement meeting Hoechst verbally represented it was authorized to contract on behalf of Chiron and the joint venture and that on their behalf, Hoechst and Genesis verbally entered a contractually binding distribution agreement. Their argument is simply that the parol evidence rule prevents the admission of evidence of oral statements which vary or contradict the terms of a written, integrated agreement and Hoechst lays out in details how this rule of substantive law applies here. Hoechst Moving Brief at pp. 10 - 13. In response, Genesis reminds the court that the written settlement agreement by its terms refers only to an agreement between the signatories, Hoechst and Genesis, and so the parol evidence rule can't by its terms bar evidence of an agreement between Genesis and Chiron and Chiron Behring. "Moreover, the settlement agreement plainly [*19] refers to the conclusion of a distribution agreement between Genesis, Chiron and the Joint Venture - it does not in any way preclude such an agreement." Genesis Opposition Brief at pp. 13-14. Genesis also relies on its arguments in its earlier brief in opposition to the Hoechst motion to the effect that where fraud is alleged, the parol evidence rule does not apply.

The court will spare the parties a walk down the path that this last argument leads us, to wit that Genesis is stuck once again with a position inconsistent with the one it now advances against the Chiron defendants--that a binding agreement was in fact reached by Hoechst acting on their behalf with authority to do so. Instead, it makes sense to look squarely in the eye what Hoechst argued and the Chiron defendants rely on now, which is the essential difficulty in accepting that Genesis is the beneficiary of a deal worth $ 12 million that is, nonetheless, in the form of an oral agreement reached one day not with the parties who must perform, but with an entity Genesis was threatening to sue for allegedly reneging on an earlier oral agreements and without any assurances from the performing parties that they assented. And [*20] further, that all this took place without being mentioned at all in the fully integrated settlement agreement Genesis reached with Hoechst, which perforce is contradicted or modified if one accepts the oral understanding Genesis presses on the Chiron defendants. And finally that this $ 12 million deal was reached and was binding on the Chiron defendants even though Jerrold Grossman returned to the United States and began a series of steps designed "to conclude" the distribution agreement with these entities he had barely had any prior dealings with other than the inconclusive efforts of a few months before. (Grossman asserted this position in his Declaration as well he had to, since no details about any terms between Chiron, the joint venture, and Genesis emerged from the meeting that Chiron and the joint venture did not attend). And finally that Grossman undertook these steps "to conclude" the agreement with full knowledge that the money paid by Hoechst was in full satisfaction of claims against Hoechst based on the parties' past dealings and that the settlement language "contained the entire agreement of the parties with respect to the subject matter hereof, and all prior understandings, [*21] discussions and representations are hereby merged herein" - that is, that for all purposes Hoechst was gone and the entities Genesis would be getting its $ 12 million deal from were Chiron and Chiron Behring (the Joint Venture) or one of them, Grossman wasn't sure at the time. (Declaration, para. 3.)

To reject the otherwise very persuasive argument that the parol evidence rule must defeat plaintiff's claims before this court on the basis that Hoechst was committing fraud that day in Frankfurt would mean that the settlement agreement language somehow must be wished away where Hoechst agrees merely *to assist* Genesis in its negotiations with Chiron and the joint venture for distribution of certain Chiron products. It

would mean further that despite that agreement's elemental and clear language, Grossman may present evidence to a jury through his testimony that makes the statement that Hoechst would "assist" a nullity, and language in the agreement that Hoescht's efforts were subject to "the understanding that Chiron has strategic leadership of the joint venture" a nullity. Obviously what the trier of fact would be presented with would be "the story of [the] negotiation" of a written [*22] contract "as told by the litigant," Advanced Medical, Inc. v. Arden Medical Sys., Inc., 955 F.3d 188, 195 (3rd Cir. 1992), toppling the enforceability of written contracts in a way inimical to the functioning of commercial transactions.

If there is a kernel of persuasiveness in plaintiff's contention that the parol evidence rule does not apply to benefit the Chiron defendants, it is that strictly speaking, Grossman's version of what happened that day might not be presented for the purpose of defeating the contract he made with Hoechst. Rather, Grossman would be offering a version of events that, he claims, created an oral, binding contract that day between his company and two entities, whose exact nature was unknown to him at the time and neither of whom was present, for distribution of a valuable vaccine based on memos between those entities sent to Hoechst, who was now departing the scene as an accepted part of the matters agreed to that day. But then the logical question would loom: on what theory can plaintiff establish that it reached an agreement with the Chiron defendants if the contract with Hoechst is not produced as a basis for its claims?

And therein lies [*23] the fatal flaw in plaintiff's claims against these defendants. He is suing for breach of contract, yet without the ability to "tell the story behind the negotiations" that led to the written agreement with Hoechst and thereby establish what it "means" as opposed to what it clearly says, Genesis cannot prove it in any way binds the Chiron defendants. That the Frankfurt meeting took place the way he describes in his Declaration gives the lie to any effort to suggest that there was already an agreement with Chiron as a result his contacts with the company in April 1996. And the ebb and flow of proposals between him and Chiron and/or Chiron Vaccines evidences without question that he was unable to put together a deal with those entities subsequent to the Frankfurt meeting. So the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, civil conspiracy (anchored on the fraud claim), and violation of the New Jersey Franchise Practices Act must fail for lack of allegations supporting the existence of any enforceable agreement between him and the Chiron defendants.

This leaves the claim against Chiron for tortious interference in the Fourth Count. [*24] Plaintiff alleges that, despite Chiron's knowledge of the alleged agreement between Genesis and Hoechst, it proceeded to enter into an agreement for the exclusive distribution of Hoechst's vaccines in the United States and that this action constitutes deliberate tortious interference with plaintiff's contractual rights and prospective advantage. But this theory presupposes plaintiff can show the existence of contractual rights flowing in his direction, just as the other claims do, and consequently it must fail as well.

In the end, explaining why this lawsuit cannot succeed when tested under F. R. Civ. P. 12 (b)(6) has consumed more space than one might expect Perhaps it is the failure of expectations that generated the litigation to begin with, and as life teaches, expectations are always dangerous. Hoechst pointed out in its supporting brief that Genesis did not, in fact get what it hoped for when it concluded its written agreement with Hoechst, which was a guaranteed distributorship in the future with the new entity/entities that had emerged from the former vaccine manufacturer, Behringwerke AG. This lawsuit cannot and should not substitute for what the negotiations did not produce. [*25] Having carefully examined plaintiff's claims advanced in the Fourth Count against Chiron and in the First, Second, Third, Sixth, and Eighth Counts of the complaint against the Chiron defendants, it is the decision of the court that these defendants' motions under F. R. Civ. P. 12(b)(6) to dismiss the complaint shall be granted for failure to state a claim against them.

CONCLUSION

For the foregoing reasons, the motion of defendant Chiron Behring GmbH & Co. to dismiss for lack of personal jurisdiction is **denied**, and the motions of defendants Chiron Corporation and Chiron Behring GmbH & Co. to dismiss the complaint are **granted**.

Date: 8/30/00

Katharine S. Hayden, U.S.D.J.

ORDER

KATHARINE S. HAYDEN, U.S.D.J.

This matter having come before the Court upon the motions of defendants, Chiron Corporation and Chiron Behring GmbH & Co., for dismissal of all claims in the complaint asserted against them; the Court having considered the submissions of the parties without oral argument and for the reasons set forth in the Court's Opinion filed this day; and for good cause shown;

It is this 30th day of August, 2000, hereby

ORDERED that [*26] the motion of defendant Chiron Behring GmbH & Co. (53-1) to dismiss for lack of personal jurisdiction is **denied**; and it is further

ORDERED that the motions of defendants Chiron Corporation and Chiron Behring GmbH & Co. (55-1 and 56-1) to dismiss the complaint are **granted**.

Katharine S. Hayden, U.S.D.J.

LEXSEE

GREEN LEAF NURSERY, INC., Plaintiff, v. KMART CORPORATION, Defendant.

CIVIL CASE NO. 05-40162

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 16566

February 28, 2006, Decided

SUBSEQUENT HISTORY: Summary judgment denied by Green Leaf Nursery, Inc. v. KMART Corp., 2007 U.S. Dist. LEXIS 32740 (E.D. Mich., May 3, 2007)

COUNSEL: [*1] For Green Leaf Nursery, Incorporated, Plaintiff: Michael David Martin, Martin Law Office, Lakeland, FL.

For K-Mart Corporation, Defendant: Michelle M. Wezner, Howard & Howard, Bloomfield Hills, MI; Patrick M. McCarthy, Howard & Howard, Ann Arbor, MI.

For K-Mart Management Corporation, Defendant: Patrick M. McCarthy, Howard & Howard, Ann Arbor, MI.

JUDGES: HONORABLE PAUL V. GADOLA, UNITED STATES DISTRICT JUDGE.

OPINION BY: PAUL V. GADOLA

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

On July 19, 2005, Plaintiff Green Leaf Nursery, Inc. filed a second amended complaint against Defendant Kmart Corporation. On August 19, 2005, Defendant filed a motion to dismiss Plaintiff's negligent misrepresentation, promissory estoppel, and common law breach of contract claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set out below, the Court will grant Defendant's motion.

I. Background

This is a federal diversity case involving a contract dispute between Plaintiff and Defendant. Plaintiff is a Florida company engaged in the ornamental nursery business. Defendant is a retail company with a principal place of business [*2] in Troy, Michigan. On November 30, 1998, both parties entered into a Purchase Order Terms and Conditions Agreement. By the agreement, Plaintiff contracted to supply Defendant with a variety of nursery products. Purchase orders by Defendant to Plaintiff could be placed by various methods, including telephone, email, fax, or Electronic Data Transmission ("EDI"). Regardless of the method chosen by Defendant, both parties were bound to the terms of the contract. After an order was placed by Defendant, Plaintiff would commit the funds, labor, and horticultural experience necessary to grow the ornamental products, and then ship the products at Plaintiff's expense to various Kmart store locations inside and outside the state of Florida.

Transactions between the parties ran smoothly from 1998 through 2003, with the alleged trouble beginning in 2004. According to Plaintiff's second amended complaint, Defendant ordered via the EDI system more products than were accepted. As a result, Plaintiff alleges that it suffered an economic loss of more than $ 1.4 million.

Plaintiff's second amended complaint contains four counts against Defendant. Count I is a common law breach of contract claim. Count [*3] II is a breach of contract claim under the Uniform Commercial Code ("UCC"). Count III is a promissory estoppel claim. Finally, Count IV is a negligent misrepresentation claim. In its motion, Defendant is only seeking to dismiss Counts I, III, and IV. Therefore, Count II will remain in this case.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes the district courts to dismiss any complaint that fails "to state a claim upon which relief can be granted." Rule 12(b)(6) allows a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. *See Minger v. Green,* 239 F.3d 793, 797 (6th Cir. 2001) (citations omitted). In applying the standards under Rule 12(b)(6), the Court must presume all well-pleaded factual allegations in the complaint to be true and draw all reasonable inferences from those allegations in favor of the non-moving party. *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir. 1993).

The Court will not, however, presume the truthfulness of any legal conclusion, opinion, or deduction, even if it is couched [*4] as a factual allegation. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987). The Court will not dismiss a cause of action "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Although the pleading standard is liberal, bald assertions and conclusions of law will not enable a complaint to survive a motion pursuant to Rule 12(b)(6). *Leeds v. Meltz,* 85 F.3d 51, 53 (2d Cir. 1996). To determine whether Plaintiff has stated a claim, the Court will examine the complaint and any written instruments that are attached as exhibits to the pleading. Fed. R. Civ. P. 12(b)(6) & 10(c).

III. Plaintiff's Common Law Breach of Contract Claim

Count I is Plaintiff's common law breach of contract claim. Both parties concede that Michigan law applies when considering this count. For the damages sought in Count I, Plaintiff seeks economic losses resulting from a contract for the sale of goods, not services. [*5] Because of this, Plaintiff's claims under Count I are governed exclusively by the UCC. *See Neibarger v. Universal Coops.,* 439 Mich. 512, 486 N.W.2d 612, 623 (Mich. 1992) ("Since the damages sought in these cases are economic losses resulting from the commercial sale of goods, the plaintiffs' exclusive remedies are provided by the UCC."). Therefore, Plaintiff is barred from bringing its common law breach of contract claim, and Count I is subsequently dismissed from the case as a matter of law.

IV. Plaintiff's Promissory Estoppel Claim

Count III of the second amended complaint is Plaintiff's promissory estoppel claim. Both parties again agree that Michigan law applies when considering this count. Plaintiff concedes that where its promissory estoppel claim overlaps with its UCC claim, the promissory estoppel claim is barred. Plaintiff argues, however, that its promissory estoppel claim applies to damages that may not be recoverable under a breach of contract claim.

The Sixth Circuit has stated that "where . . . the performance which is said to satisfy the detrimental reliance requirement of the promissory estoppel theory is the same performance which represents consideration [*6] for the written contract, the doctrine of promissory estoppel is not applicable." *General Aviation, Inc. v. Cessna Aircraft Co.,* 915 F.2d 1038, 1042 (6th Cir. 1990) (quoting the district court's decision, 703 F. Supp. 637, 647 n.10). The Court finds that this rule controls the instant case. All of the damages sought by Plaintiff arise out of the actions of the parties made pursuant to the November 30, 1998 Purchase Order Terms and Conditions Agreement. The performance which makes up Plaintiff's detrimental reliance is the same performance that forms Plaintiff's consideration for the written contract. Consequently, the doctrine of promissory estoppel is not applicable in the current case. Plaintiff, therefore, cannot bring its promissory estoppel claim, and Count III is subsequently dismissed from the case as a matter of law.

V. Plaintiff's Negligent Misrepresentation Claim

Count IV of the second amended complaint is Plaintiff's negligent misrepresentation claim. The choice of law clause of the Purchase Order Terms and Conditions Agreement states: "Each order, and all other aspects of the business relationship between buyer and vendor, shall be [*7] construed and enforced in accordance with the internal laws of the state of Michigan." The Court finds that this choice of law clause is controlling and that Michigan law applies when considering Plaintiff's negligent misrepresentation claim.

In Michigan, the economic loss doctrine "precludes [a] plaintiff from bringing an action in tort where damages arise out of the commercial sale of goods and the losses incurred are purely economic." *Allmand Assocs. v. Hercules Inc.,* 960 F. Supp. 1216, 1222-23 (E.D. Mich. 1997) (Gadola, J.). An exception to the economic loss doctrine recognized in Michigan courts is for fraud in the inducement. *See id.* at 1227. This exception applies when the allegations of fraud are "extraneous to the contractual dispute." *Id.* at 1228; *Dinsmore Instrument Co. v. Bombardier, Inc.,* 199 F.3d 318, 320 (6th Cir. 1999). In the instant case, Plaintiff's damages arise out of the commercial sale of goods to Defendant and Plaintiff's losses are purely economic. In addition, the Court finds that the alleged misrepresentations by Defendant were made in connection with the underlying contract dispute between

[*8] the parties. Therefore, the Court is compelled to rule that the exception to the economic loss doctrine is not applicable in this case as there are no allegations of fraud "extraneous to the contractual dispute." Plaintiff is barred from bringing a negligent misrepresentation claim because of the economic loss doctrine, and Count IV is subsequently dismissed from the case as a matter of law.

VI. Conclusion

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to dismiss [docket entry 10] is **GRANTED.**

IT IS FURTHER ORDERED that Count I (common law breach of contract), Count III (promissory estoppel), and Count IV (negligent misrepresentation) are **DISMISSED,** leaving only Count II (UCC) remaining in the action.

SO ORDERED.

Dated: February 28, 2006

HONORABLE PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE

LEXSEE

DEIDRE HAMILTON, PLAINTIFF-APPELLANT vs. SYSCO FOOD SERVICES OF CLEVELAND, INC., DEFENDANT-APPELLEE

No. 87558

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

170 Ohio App. 3d 203; 2006 Ohio 6419; 866 N.E.2d 559; 2006 Ohio App. LEXIS 6369

December 7, 2006, Released

PRIOR HISTORY: Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-549432.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Eric Norton, The Norton Law Firm Co. LPA, Cleveland, Ohio.

FOR APPELLEE: Roger L. Schantz, Jennifer M. Turk, Benesch, Friedlander, Coplan & Aronoff LLP, Columbus, Ohio.

JUDGES: BEFORE: Calabrese, J., Cooney, P.J., and Rocco, J. ANTHONY O. CALABRESE, JR., JUDGE. KENNETH A. ROCCO, J., CONCURS; COLLEEN CONWAY COONEY, P.J., CONCURS IN PART AND DISSENTS IN PART.

OPINION BY: ANTHONY O. CALABRESE, JR.

OPINION

[*204] [***560] JOURNAL ENTRY AND OPINION

ANTHONY O. CALABRESE, JR., J.:

[**P1] Plaintiff-appellant, Deidre Hamilton ("appellant"), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

I.

[**P2] According to the facts, appellee SYSCO Food Services of Cleveland, Inc. ("SYSCO") is in the business of providing products and services to food service operators in the food service marketing and distribution industry. Appellant was first employed by SYSCO on January 29, 1996 as a transportation clerk. On or about September 2, 1996, appellant became a part-time transportation clerk and [*205] was subsequently switched back to a full-time transportation clerk position on or about June 16, 1997. On or about October 18, 1999, she accepted an administrative assistant-transportation position, and on July 3, 2000, appellant accepted the position of city desk supervisor. Thereafter, in 2002, she accepted the position of transportation supervisor and occupied such position until her layoff on October 29, 2004.

[**P3] In May 2004, the Cooker restaurant chain shut down all of its restaurants in northeastern Ohio. Consequently, SYSCO lost all of its business with that restaurant chain. In addition, during that same time period in 2004, SYSCO was being pressured by its parent company, SYSCO Corporation, to reduce the number of employees in its operations department to bring that number within the company benchmarks. This had a dramatic impact on the number of truck drivers available to drive delivery routes. In February 2004, the operations department employed approximately 160 drivers to make its scheduled delivery routes. By the end of October 2004, the number of truck drivers available to make delivery routes had been reduced to approximately 115 drivers.

[**P4] As a result of this reduction in business, Brian Cook, SYSCO's vice-president of operations, implemented a reduction in force which included three series of layoffs in 2004 within the operations department. In carrying out the reduction in force, three supervisory employees, in addition to appellant, were laid off in the operations department in 2004. They included William O'Donnell, William Dickerson, and Rick Leonard. One additional [***561] employee,

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866 N.E.2d 559, ***; 2006 Ohio App. LEXIS 6369

Christopher Rivera, resigned during 2004. As a result, a total of five supervisory employees were eliminated from the operations department in 2004.

[**P5] Customer service problems began to increase during the year, and in October 2004, Cook analyzed the transportation supervisor position and determined that all persons holding that position must possess a CDL. He believed that requiring every transportation supervisor to have a CDL would allow each transportation supervisor, if necessary, to drive a delivery route and thereby improve customer service by lessening or eliminating late deliveries.

[**P6] Nicholas Council and David Sekala both possessed a CDL and retained their transportation supervisor positions. David Sullivan did not possess a CDL and was transferred to a warehouse supervisory position. SYSCO states that Sullivan was transferred, while appellant was not, because Sullivan had extensive experience in the warehouse side of the business, while appellant had no experience in the warehouse side or with the various computer systems used in the warehouse. [1]

1 Tr. 26.

[**P7] According to the record, appellant filed a complaint against SYSCO arising out of her layoff from her employment. In her original complaint, [*206] appellant asserted race and gender discrimination claims relating to her layoff and to the alleged deprivation of certain "training opportunities" during her employment relationship with SYSCO. On April 18, 2005, the trial court permitted appellant to file a first amended complaint in which she asserted an additional wrongful discharge claim. Appellant then filed a second amended complaint.

[**P8] On June 9, 2005, SYSCO answered appellant's second amended complaint, denying that it had discriminated against appellant, and further reiterating that appellant was laid off as part of a reduction in force and reorganization of the operations department because she did not possess a CDL.

[**P9] On August 29, 2005, SYSCO filed its motion for summary judgment seeking the dismissal of appellant's second amended complaint. On October 3, 2005, during the pendency of the motion for summary judgment, appellant dismissed all of her race discrimination claims alleged against SYSCO. She then filed two memoranda in opposition to the motion for summary judgment. The trial court granted the motion and dismissed appellant's second amended complaint on December 29, 2005. Appellant timely appealed the trial court's judgment entry granting summary judgment in favor of SYSCO.

II.

[**P10] Appellant's first assignment of error states the following: "The trial court erred in granting summary judgment on plaintiff's discrimination claims because there were genuine fact issues as to whether gender was a factor in plaintiff being treated worse than similarly-situated male coworkers, laid off and subsequently fired."

[**P11] Appellant's second assignment of error states the following: "The trial court erred in granting summary judgment on plaintiff's negligent misrepresentation claim because there were genuine fact issues as to whether plaintiff detrimentally relied on defendant-management's misrepresentations that it was not necessary for her to independently obtain CDL training."

III.

[**P12] Appellant argues in her first assignment of error that the lower court erred in granting summary judgment on [***562] her discrimination claims because there were genuine fact issues as to whether gender was a factor in her being treated worse than similarly-situated male coworkers, laid off and subsequently fired.

[**P13] Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of [*207] law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

[**P14] It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L. Ed. 2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992 Ohio 95, 604 N.E.2d 138.

[**P15] We find that summary judgment was properly granted in SYSCO's favor. There was nothing in the pleadings that disputes appellee's argument. Appellant at all times bears the burden of proving that she was discriminated against on account of her gender.

St. Mary's Honor Center v. Hicks (1993), 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407. SYSCO did not discriminate against appellant when it laid her off and subsequently terminated her because she did not possess a CDL. Moreover, appellant was laid off because of a valid reduction in force. An employee's burden in demonstrating discrimination is heavier when a reduction in force is required by economic necessity. *Carpenter v. Wellman Products Group,* Medina App. No. 02-CIV-0262, 2003 Ohio 7169. SYSCO did not discriminatorily deny appellant any training opportunities. Appellant failed to prove that similarly-situated employees were treated better than her.

[**P16] We find nothing in the record demonstrating that the lower court's actions were improper.

[**P17] Accordingly, appellant's first assignment of error is overruled.

[**P18] Appellant argues in her second assignment of error that the lower court erred in granting summary judgment on her negligent misrepresentation claim because there were genuine fact issues as to whether appellant detrimentally relied on SYSCO's misrepresentations that it was not necessary for her to independently obtain CDL training.

[**P19] In *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 4, 534 N.E.2d 835, the Ohio Supreme Court articulated the elements of negligent misrepresentation as follows:

> "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the [*208] information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

[**P20] Therefore, the elements for negligent misrepresentation "require (1) a [***563] defendant who is in the business of supplying information; and (2) a plaintiff who sought guidance with respect to his business transactions from the defendant." *Nichols v. Ryder Truck Rental, Inc.* (June 23, 1994), Cuyahoga App. No. 65376, 1994 Ohio App. LEXIS 2697, discretionary appeal not allowed (1994), 71 Ohio St. 3d 1421, 642 N.E.2d 386.

[**P21] In *Nichols,* this court specifically rejected the application of the tort of negligent misrepresentation to an employer-employee relationship because an employer is not in the business of supplying information for the guidance of others. We concluded:

> "Such persons who are in the business of supplying information for the guidance of others typically include attorneys, surveyors, abstractors of title and banks dealing with no-depositors' checks. The business transactions of the alleged injured party are usually those involving lease or insurance agreements. No court in Ohio, however, has held the tort of negligent misrepresentation applicable to the employer-employee relationship." (Citations omitted).

[**P22] Appellant acknowledges that no employee has been successful in maintaining a cause of action for negligent misrepresentation against an employer. However, she asks us to recognize a "developing" trend in the law of the tort of negligent misrepresentation in employer-employee relationships. In support of this statement, she relies on other states which recognized such a cause of action. She argues that this trend in other states suggests that "if the Ohio Supreme Court was specifically asked to decide whether an employer can be held liable for negligent misrepresentations to an employee, it would hold that such a liability may arise." We find that if the Ohio Supreme Court wanted to recognize such a cause of action, it had the opportunity to do so in *Nichols.* Moreover, a majority of the cases cited by appellant in support of this argument existed prior to our decision in *Nichols* and prior to the Ohio Supreme Court's denying the *Nichols'* appeal.

[**P23] Therefore, based on our precedent in *Nichols,* we find that the trial court properly granted summary judgment in favor of SYSCO on appellant's negligent misrepresentation claim.

[**P24] Accordingly, the second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.ANTHONY O. CALABRESE, JR., JUDGE

KENNETH A. ROCCO, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., CONCURS IN PART AND DISSENTS IN PART. (SEE SEPARATE CONCURRING AND DISSENTING OPINION.)

CONCUR BY: COLLEEN CONWAY COONEY (In Part)

DISSENT BY: COLLEEN CONWAY COONEY (In Part)

DISSENT
[*209]

COLLEEN CONWAY COONEY, P.J., Concurring in Part and Dissenting in Part:

[**P25] I agree with the majority's treatment of the second assignment of error regarding the negligent misrepresentation claim. However, I respectfully dissent on the gender discrimination claim and would reverse the trial court's grant of summary judgment.

Gender Discrimination

[**P26] Hamilton argues in her first assignment of error that the trial court erred in granting summary judgment on her discrimination claims because there were genuine issues of fact as to whether gender was a factor in her being treated worse than similarly-situated male co-workers, her being laid off, and her subsequent termination.

[**P27] R.C. 4112.02(A) provides:

> "It shall be an unlawful discriminatory practice: [***564] For any employer, because of the * * * sex, * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

R.C. Chapter 4112, is Ohio's counterpart to Section 2000e, Title 42, U.S. Code ("Title VII"). Therefore, federal case law interpreting Title VII is generally applicable to cases brought under Chapter 4112. See, *Genaro v. Cent. Transport, Inc.*, 84 Ohio St. 3d 293, 295, 1999 Ohio 353, 703 N.E.2d 782; *Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128.

[**P28] In order to prevail in an employment discrimination case, Hamilton must directly or indirectly prove discriminatory intent. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 587-588, 1996 Ohio 265, 664 N.E.2d 1272; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 128-129, 1996 Ohio 307, 672 N.E.2d 145.

[**P29] Hamilton argues that she can prove her case indirectly, which permits her to establish discriminatory intent through the analysis set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817. To establish a prima facie case of gender discrimination, Hamilton must show: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) that the position was filled by a person outside the protected class. *McDonnell Douglas*, supra at 802; *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 701 N.E.2d 1023. Hamilton may also establish the fourth prong of the *McDonnell Douglas* test by showing that she was treated less favorably than a similarly-situated employee [*210] outside her protected class. *Clayton v. Meijer, Inc.* (6th Cir. 2002), 281 F.3d 605, 610. In such a case, Hamilton must prove that all relevant aspects of her employment situation were similar to those of the employee with whom she seeks to compare herself. *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 32, 2001 Ohio 59, 748 N.E.2d 36, citing *Ercegovich v. Goodyear Tire & Rubber Co.*, (6th Cir. 1998), 154 F.3d 344, 352.

[**P30] However, in situations like the instant case where the defendant claims a reduction in work force, the plaintiff is not required to plead the fourth prong of the prima facie framework because in a reduction of force situation, the plaintiff is not replaced. *Godfredson v. Hess & Clark, Inc.* (6th Cir. 1999), 173 F.3d 365. Instead, the plaintiff must present additional direct, circumstantial, or statistical evidence tending to show that the employer singled out the plaintiff for discharge for impermissible reasons. *Barnes v. GenCorp, Inc.* (6th Cir. 1990), 896 F.2d 1457, 1465.

[**P31] The establishment of a prima facie case of discrimination under *McDonnell Douglas* creates a presumption that the employer unlawfully discriminated against the employee. *Texas Dep't of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 67 L.Ed.2d 207, 101 S.Ct. 1089.

[**P32] Once a prima facie case of discrimination is established, SYSCO may overcome the presumption by coming forward with a legitimate, nondiscriminatory reason for the discharge. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 575 N.E.2d 439. Hamilton must then present evidence that SYSCO's proffered

reason was a mere pretext for unlawful discrimination. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668, 591 N.E.2d 752. Hamilton's burden is [***565] to prove that SYSCO's reason was false and that discrimination was the real reason for the discharge. *Wagner v. Allied Steel & Tractor Co.* (1995), 105 Ohio App.3d 611, 617, 664 N.E.2d 987. Mere conjecture that SYSCO's stated reason is a pretext for intentional discrimination is insufficient to defeat SYSCO's motion for summary judgment. To satisfy her burden, Hamilton must produce some evidence that SYSCO's proffered reasons were factually untrue. *Powers v. Pinkerton, Inc.*, Cuyahoga App. No. 76333, 2001 Ohio 4119.

Was Hamilton Qualified

[**P33] In the instant case, it is undisputed that Hamilton has satisfied the first two prongs of the *McDonnell Douglas* test. Hamilton, as a female, is a member of a protected class, and she suffered an adverse employment action by being laid off and subsequently terminated. Therefore, I would focus on the third and fourth requirements under *McDonnell Douglas* -- whether Hamilton was qualified for the position of transportation supervisor and whether she was replaced by someone outside the protected class or was treated differently than similarly-situated [*211] male employees. I find that questions of fact exist regarding both of these elements.

[**P34] SYSCO argues that Hamilton was not qualified for the position of transportation supervisor at the time she was laid off because she did not possess a commercial driver's license ("CDL"). This court has held that, to establish whether a person is "qualified," the plaintiff must demonstrate not only that she was capable of performing the work, but that she also met the employer's legitimate needs and expectations. *Neubauer v. A.M. McGregor Home Corp.* (May 19, 1994), Cuyahoga App. No. 65579, 1994 Ohio App. LEXIS 2153.

[**P35] Although in *Neubauer* this court held that the decision whether an employee is qualified is measured at the time of termination, applying that standard would be unjust in the instant case. At the time Hamilton was laid off, management had implemented a new criteria for the position of transportation supervisor, which required that all transportation supervisors possess a CDL. Prior to that time, possession of a CDL was not required to meet the employer's needs and expectations for the position of transportation supervisor. In fact, deposition testimony reveals that Hamilton was qualified for the position of transportation supervisor until the additional requirement was implemented. Neither Hamilton nor her male co-worker, David Sullivan possessed a CDL and both lost their positions as transportation supervisor. However, only Hamilton was laid off. Sullivan, who had experience in the warehouse department, was transferred there as a warehouse supervisor, where a CDL was not required.

[**P36] I would find that genuine issues of material fact exist as to whether Hamilton was "qualified." The imposition of a new requirement for someone who was otherwise qualified for the job, and then the termination of that person for lack of the new requirement could be deemed unconscionable, especially when that person had been requesting the necessary training to meet the requirement for several years.

[**P37] In *Wexler v. White's Furniture, Inc.* (6th Cir. 2003), 317 F.3d 564, 574, the court held that a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when considering whether the fired employee was qualified. "To do so would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination." Id. Instead, the [***566] court should focus on plaintiff's objective qualifications, i.e. education, experience in the relevant industry, and demonstrated possession of the required general skills. Id. at 575-576.

[**P38] SYSCO's alleged nondiscriminatory reason for laying off Hamilton was her lack of a CDL. Pursuant to *Wexler,* a court cannot consider this reason when determining whether Hamilton was qualified. Because this was the only reason [*212] given by SYSCO as to why Hamilton was unqualified, summary judgment was improperly granted on this issue.

Hamilton's Replacement

[**P39] In establishing the fourth prong of the *McDonnell Douglas* test, Hamilton argues that a male employee replaced her as a transportation supervisor when she was initially laid off and ultimately terminated. Moreover, she further claims that she was treated differently than similarly-situated male employees because she was not given free CDL training.

[**P40] SYSCO argues that because Hamilton was terminated due to a reduction in force, she carries the heavier burden of proving by direct, circumstantial, or statistical evidence that she was singled out for impermissible reasons. See, *Barnes,* supra.

[**P41] Although the *Barnes* court recognized a heavier burden on a plaintiff in a work force reduction case, it also emphasized the importance of ensuring that

such burden is applied only in a "true" work force reduction situation:

> "It is important to clarify what constitutes a true work force reduction case. A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties."

Barnes, supra at 1465. See, also, *Langlois v. W.P. Hickman Sys., Inc.,* Cuyahoga App. No. 86930, 2006 Ohio 3737, citing *Atkinson v. Internatl. Technegroup, Inc.* (1995), 106 Ohio App.3d 349, 359, 666 N.E.2d 257. Furthermore, an employer cannot avoid liability by changing the job title or by making minor changes to a job in an attempt to avoid liability. Id. See, also, *Kirkendall v. Parker Hannifin Corp.* (July 12, 1995), Lorain App. No. 94CA005955, 1995 Ohio App. LEXIS 2965.

[**P42] In the instant case, the evidence shows that when Hamilton was laid off, she held the position of transportation supervisor. After the layoff, Mark Wolf ("Wolf") and Allen Shoup ("Shoup") were transferred to the transportation department and were given positions as transportation supervisors. John Brian Cook, vice president of operations at SYSCO, testified that Wolf and Shoup were transferred to those positions because they possessed a CDL and were able to perform the additional duty now required for the position.

[*213] [**P43] Wolf testified that his position as safety manager was eliminated and thus he was transferred to the transportation supervisor position. The evidence also shows that Wolf had seniority over Hamilton. However, Shoup did not have seniority over Hamilton, but he possessed a CDL. He testified that his fleet supervisor position was also eliminated, so he was transferred to the transportation supervisor position.

[**P44] [***567] The evidence shows that after Hamilton was laid off, her duties were performed by other transportation supervisors and her supervisor. Therefore, it would appear that Hamilton was not "replaced" as defined in *Barnes* because her work was redistributed and an additional duty was implemented. However, Wolf and Shoup were reassigned from their previous positions to perform Hamilton's duties. Although the evidence shows that the two men had the additional duty of driving a commercial truck, testimony also established that this was not a new and additional duty because transportation supervisors were performing this task prior to the alleged reduction in force and layoff.

[**P45] Moreover, this "additional duty" could also be deemed a minor part of the job. In fact, Shoup stated in his July 2005 deposition that he had on only three or four occasions since his October 2004 transfer, been required to drive a truck which necessitated a CDL. David Sekala stated that, between October 2004 and May 2005, he had to drive a truck which required a CDL approximately three to five times.

[**P46] Christopher Thomas stated in his May 2005 deposition that, since becoming a transportation supervisor in January 2005, he had driven a truck only once. At his second deposition in October 2005, he claimed that he had driven a commercial truck three additional times. During the May deposition, he stated that there was no need for transportation supervisors to have a CDL. He further opined that, based on his day-to-day experience working as a transportation supervisor, he did not think possessing a CDL was "essential," based on the actual amount of driving involved. He also averred that, based on his experience, a transportation supervisor did not need a CDL to be a successful and productive employee at SYSCO.

[**P47] However, Bo Nash stated that since he received the transportation supervisor position, he had driven a truck approximately eight times between July and October 2005. Nick Council stated that since October 2004 he had driven many trucks, sometimes once per week.

[**P48] Even evaluating the prima facie case under the heavier burden, evidence exists demonstrating that Hamilton's duties were merely redistributed, and individuals were assigned to perform her duties as well as other duties. However, evidence also exists showing that Wolf and Shoup were "reassigned" from their previous positions to help perform Hamilton's duties. Viewing the evidence in the light most favorable to Hamilton, questions of fact exist as to whether [*214] possession of a CDL for the occasional need to relieve union drivers was an integral part of the transportation supervisor position or constituted a minor change in the job description. Therefore, genuine issues of fact exist

whether Hamilton was terminated because of a "true" reduction in force.

Different Treatment

[**P49] I would further find that genuine issues of material fact exist as to whether Hamilton was treated differently than similarly-situated male employees when SYSCO refused to provide her with free CDL training. The evidence shows that SYSCO was providing free on-site CDL training to male employees who were working primarily in the warehouse department. [2] According to Cook, free CDL training was offered in the 1990's, when "the company used to have a policy whereas a matter of career advancement, night warehouse men particularly, as opposed to others, could [***568] have taken advantage of it if they wanted to, but typically what happens is, night warehouse men would get their CDL and then they could stop working night shift and start working days as a driver."

2 According to SYSCO's motion, the warehouse is a part of the "operations department," which also included the transportation department where Hamilton worked.

[**P50] Based on this testimony, the CDL training was not mandatory but useful as a means for "career advancement" to those warehouse employees wishing to take advantage of the free training. The evidence shows that between 1994 and 1999, while the program was in place, approximately 32 men received the free CDL training offered by SYSCO. During that time, Hamilton repeatedly asked for the training, which was repeatedly denied.

[**P51] SYSCO argues that the free training offered cannot be considered because, based on Hamilton's own admissions, her cause of action does not arise out of actions that occurred while she was a transportation clerk. Hamilton was a transportation clerk between 1996 and October 1999. Although a majority of the free training occurred during this time, the evidence shows that it continued into 2000 and 2001 when Hamilton was an administrative assistant and city desk transportation supervisor.

[**P52] Justin Reasoner, an assistant fleet supervisor at SYSCO, received free CDL training sometime between 2000 and 2001, but he did not complete it. He stated that he did not request the training, but rather it was arranged for him. Daryl Lengyel stated at deposition that he provided CDL training to SYSCO employees from 1994 until 2001, with Reasoner being the last trainee in 2000. Therefore, evidence exists showing that free CDL training continued after Hamilton was promoted from the transportation clerk position. Moreover, evidence also exists that warehouse employees were not the only employees who received the training. John Cruikshank, a transportation supervisor, received [*215] the free training in February 1999. According to Hamilton, Cruikshank complained about being required to get CDL training when Hamilton was not, although she was also a supervisor.

[**P53] Nevertheless, SYSCO claims that Hamilton was not similarly situated to the male employees in the warehouse. Although it is true that Hamilton was not working in the warehouse, both the warehouse and transportation departments are divisions of the operations department. Furthermore, possessing a CDL was not necessary for those warehouse employees to perform their jobs, rather it was a means of career advancement. Hamilton also believed that possession of a CDL would aid her career advancement at SYSCO. She stated at deposition that she had advised management that her goal was to obtain her CDL and ultimately become a transportation supervisor. Therefore, questions of fact exist whether the warehouse employees and Hamilton were similarly situated because both sought the CDL training for career advancement.

[**P54] Even if we did not consider the period when Hamilton was a transportation clerk, questions of fact exist whether Hamilton was similarly situated to Justin Reasoner, who received the training while Hamilton was an administrative assistant and city desk transportation supervisor. SYSCO claims the two were not similarly situated because Reasoner was an "assistant fleet supervisor."

[**P55] Different job titles alone do not prove that employees are not similarly situated. In order to determine whether an employee is similarly situated to another, we must consider the "relevant aspects" of their job positions and duties. *Kroh,* supra at 32, citing *Ercegovich,* supra.

[**P56] [***569] In the instant case, both Reasoner and Hamilton worked in the operations department and reported to the same supervisor at the time Reasoner received the free CDL training. The evidence demonstrates that a CDL was not required for either Hamilton or Reasoner's respective jobs. In fact, Reasoner did not lose his position as assistant fleet supervisor when he did not complete the CDL training. Instead, he was promoted to transportation supervisor. He admitted at his deposition that he did not possess a CDL even though he was then director of fleet operations.

[**P57] Hamilton was the only administrative assistant in the transportation department, and she received this title shortly after she was passed over for the transportation supervisor position given to

Cruikshank in 1999. During that time, she continued to request the free CDL training. In July 2000, the transportation department created a new position for her, "city desk transportation supervisor." Again, she requested the free CDL training. Despite her requests, she was denied the training because it was "not required for her job."

[**P58] Although Reasoner and Hamilton had different job titles, they were part of the same general department, reported to the same supervisor, and a CDL [*216] was not required for their jobs. Nevertheless, Reasoner received the CDL training and, although he did not complete it, he was promoted. Reasonable minds can reach different conclusions as to whether Hamilton was similarly situated to Reasoner when he was provided the CDL training and she was not.

[**P59] Even if Hamilton and Reasoner were not similarly situated, an issue of material fact still exists, because offering and providing Reasoner the free CDL training demonstrates that SYSCO provided non-warehouse employees and supervisors the free CDL training that Hamilton repeatedly requested. Moreover, no evidence was presented that SYSCO denied the free CDL training to anyone requesting it. From the record before us, it appears that only Hamilton was denied the free training.

[**P60] Therefore, the evidence that non-warehouse supervisors received free CDL training creates a genuine issue of material fact whether Hamilton was treated differently than similarly-situated male employees. At the time that Reasoner received the training, Hamilton was a city desk transportation supervisor. Denying her the training that was provided to another assistant supervisor creates an issue of fact which precludes summary judgment.

[**P61] Accordingly, I would find that genuine issues of material fact exist whether Hamilton has established a prima facie case for gender discrimination.

Reduction in Force

[**P62] Even though questions of fact exist as to whether Hamilton can establish a prima facie case for gender discrimination, summary judgment would be proper if SYSCO demonstrated that it had a legitimate, nondiscriminatory reason for laying off and ultimately terminating Hamilton and that it had a legitimate, nondiscriminatory reason for not providing Hamilton the CDL training she requested.

[**P63] SYSCO claims its legitimate, nondiscriminatory reason was that, due to economic necessity, a valid reduction in force was necessary, which prompted management to assign additional duties to the transportation supervisor position, which required a CDL. Because Hamilton did not possess a CDL, she was laid off.

[**P64] Ohio courts have recognized that a reduction in force due to economic necessity can be a legitimate, nondiscriminatory [***570] reason for an employee's discharge. See, e.g. *Langlois,* supra. However, as we stated above, questions of fact exist as to whether Hamilton's discharge was based on a true reduction in force. While requiring all transportation supervisors to posses a CDL appears legitimate on its face, genuine issues of material fact exist as to whether its application and effect were discriminatory. When the additional requirement was implemented requiring all transportation supervisors [*217] to possess a CDL, SYSCO knew that Hamilton did not possess a CDL and, because she lacked a CDL, she would be laid off.

[**P65] Although SYSCO repeatedly relies on the fact that Sullivan also lost his position as a transportation supervisor, Sullivan did not suffer the same adverse action as Hamilton due to his prior experience in the warehouse, where possession of a CDL was not required. Thus, only Hamilton, the sole female transportation supervisor, was laid off.

[**P66] Moreover, SYSCO has failed to set forth any legitimate, nondiscriminatory reason why it did not provide the free CDL training to Hamilton when she requested it for years. As previously discussed, SYSCO was providing free on-site CDL training to male employees who were working primarily in the warehouse. Although SYSCO argues that Hamilton did not require a CDL to perform her job duties at that time, the evidence shows that none of the male employees needed a CDL to perform their job duties while working in the warehouse. In fact, Cook stated at deposition that the free CDL training was a means of "career advancement" for the "night warehouse men." Because Hamilton stated that she inquired about the training for her career advancement, questions of fact exist as to whether SYSCO's reason for denying her the training was discriminatory.

[**P67] Therefore, viewing the evidence in the light most favorable to Hamilton, I would find that the trial court erred in granting SYSCO summary judgment on Hamilton's gender discrimination claim. Reasonable minds could reach different conclusions as to whether SYSCO's denying CDL training to Hamilton prevented her from obtaining her CDL, which constituted the basis for her being laid off.

[**P68] Accordingly, I would reverse the trial court's decision on this claim.

LEXSEE

MARK W. HARDIN, Plaintiff, v. SYNTHES (U.S.A.), a foreign corporation, Defendant

No. 87 C 4036

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1990 U.S. Dist. LEXIS 3508

March 29, 1990, Decided

OPINION BY: [*1] ALESIA

OPINION

MEMORANDUM OPINION AND ORDER

JAMES H. ALESIA, UNITED STATES DISTRICT JUDGE

Defendant Synthes (U.S.A.)'s ("Synthes") motion for summary judgment as to Count III of the Amended Complaint, which alleges breach of the implied warranties of merchantability and fitness for a particular purpose, is now before the Court. For the reasons set forth in this opinion, defendant's motion is granted.

I. FACTS

Plaintiff Mark W. Hardin ("Hardin") suffered a broken femur as a result of a motorcycle accident in 1981. A series of surgeries were performed on Hardin during which synthetic rods were placed in his leg to immobilize the fracture. The rods were manufactured by more than one manufacturer. Defendant Synthes is the manufacturer of the "medullary nail", which was the rod placed in Hardin's leg during his third surgery which occurred on November 25, 1983 at Highland Park Hospital. Synthes delivered the medullary nail at issue to Highland Park Hospital on November 21, 1983. The medullary nail allegedly broke in Hardin's leg on August 16, 1985, requiring another surgery, following which Hardin received the broken medullary nail. Hardin filed suit against other manufacturers of [*2] synthetic rods on November 14, 1985 in Hardin v. Boehringer Mannheim Corp. and Depuy Co., 85 C 9652 (N.D. Ill.). Hardin commenced the instant action on April 30, 1987, against Sulzer Brothers ("Sulzer"), a Swiss manufacturer of prosthetic devices. Hardin did not serve Sulzer until April of 1988. Hardin then voluntarily dismissed Sulzer from this action and filed an Amended Complaint against Synthes on November 30, 1988.

II. DISCUSSION

Synthes' first argument focuses on the statute of limitation [1] applicable to claims for breach of warranty under the Illinois Commercial Code. Ill. Rev. Stat. ch. 26, 2-725 (1961). Section 2-725 establishes a four year statute of limitation applicable to breach of warranty claims arising from the sale of goods. The statute begins to run upon the delivery of the goods, which are the subject of the contract. In this case, Synthes argues that the date of accrual of the cause of action for breach of warranty was November 21, 1983, the date upon which Synthes delivered the medullary nail to Highland Park Hospital. Under Synthes' analysis, the statute expired on November 21, 1987. Hardin initiated this action on April 30, 1987, well before the [*3] expiration of the statute. Hardin did not amend his complaint to add Synthes as a defendant, however, until November of 1988 and did not serve Synthes until December 20, 1988, over one year after the expiration of the statute of limitation. Moreover, Synthes argues that it had no notice of this lawsuit until it was served.

1 Synthes answered the Amended Complaint on October 26, 1989, and filed its motion for summary judgment at the same time. The Answer admits or denies the allegations of the Amended Complaint and sets forth no affirmative defenses. The defense is not waived, however, as the defendant raised the defense by motion at the same time the answer was filed and no prejudice results from the defendant raising the defense by motion for summary judgment. Fed.R.Civ.P. 12(h); McMahon v. Eli Lilly and Company, No. 82 C 2822 (N.D. Ill. April 14, 1988).

Synthes argues that section 2-725(3) applies to the facts of this case and bars Hardin's claim. Section 2-725(1) and (3) provide in part:

An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued . . . Where an action commenced within the time limited . . . is so [*4] terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance.

Plaintiff's entire response to Synthes' first argument is as follows: "Plaintiff's action against Defendant SYNTHES commenced on the same day that Defendant SULZER BROS. was dismissed, clearly meeting the six-month time requirement of Section 2-725 of the U.C.C. [Ill. Rev. Stat. Ch. 26 § 2-725 (3)]. Thus, plaintiff's action against SYNTHES is not time barred." (Plaintiff's Response, p.2).

Synthes' second argument is that even if Hardin's breach of warranty claims were timely filed, Hardin did not provide Synthes with adequate notice of his claims as required by Section 2-607(3), which provides in part:

Where a tender has been accepted . . . the buyer must within a reasonable time after he discovered or should have discovered any breach notify the seller of breach or be barred from any remedy . . . Ill. Rev. Stat. ch. 26, 2-607(3) (1961).

Synthes claims that it did not receive notice within the meaning [*5] of the statute until it was served on December 20, 1988. Hardin responds that he provided notice on August 16, 1985 to the Highland Park Hospital staff who observed the failure of the medullary nail. Hardin argues that notice to the hospital, the immediate seller of the nail, suffices against Synthes and that in any event, he provided reasonably timely notice to Synthes upon discovery of Synthes identity.

A. Standard of Review

A motion for summary judgment is granted only if the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Howland v. Kilquist, 833 F.2d 639, 642 (7th Cir. 1987). "In determining whether a genuine issue of material fact exists, the court must construe the facts alleged in the light most favorable to the party opposing the motion for summary judgment." Oxman v. WLS-TV, 846 F.2d 448, 452 (1988).

B. Statute of Limitation

Illinois courts do not apply the discovery rule to breach of warranty claims. Moorman Manufacturing Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 454 (1982). Section 2-725(1) provides that the action for breach of warranty [*6] must be brought within four years after the cause of action accrues. Section 2-725(2) provides that a cause of action for breach of warranty accrues upon tender of delivery of the goods, unless the warranty explicitly extends to future performance of the goods, in which case the cause of action accrues upon discovery of the defect. A warranty that explicitly extends to future performance is an express warranty. Chicago Heights Venture v. Dynamit Nobel of America, 575 F.Supp. 214, affirmed, 782 F.2d 723 (7th Cir. 1983). In the instant case, there is no issue that the action filed against Sulzer was timely filed. Also, at no time did Hardin voluntarily dismiss the action. Rather, Hardin voluntarily dismissed Sulzer and at the same time, added Synthes as a defendant with leave of court. Finally, the Section 2-725(3) six month exception is, by its own terms, applicable only to other remedies arising out of the same breach. While it is true that the Complaint and the Amended Complaint assert the same causes of action, Sulzer and Synthes can not be responsible for the same breach. [2] For these reasons, Section 2-725(1) is inapposite. The issue is whether the amendment to add Synthes [*7] relates back to the filing of the Complaint for purposes of the statute of limitation. That issue is resolved with reference to Rule 15(c) of the Federal Rules of Civil Procedure, [3] which provides as follows:

Relation Back of Amendments . . . An amendment changing the party against whom a claim is asserted relates back if . . . (the claim asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth . . . in the original pleading) and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

It is undisputed that Synthes did not receive notice of the lawsuit until service was achieved on December 20, 1988. Hardin cites Malawy v. Richards Manufacturing Co., 150 Ill. App. 3d 549, 501 N.E.2d 376 (5th Dist. 1986), app. den., 114 Ill.2d 547, 508 N.E.2d 729 (1987), as standing for the proposition [*8] that Synthes received notice of the lawsuit by virtue of Highland Park Hospital's knowledge of the breach.

2 The Illinois Code Comment to Section 2-725 indicates that the six-month exception set forth in Section 2-725(3) was intended for those situations in which the same plaintiff amends his or her timely-filed complaint after the statute of limitation has expired but against the same defendant. Thus, the Comment states: "This subsection would apply, for example, in an instance where the aggrieved party sued for an injunction within the permitted time but the court decided after the limitation period that the aggrieved party was not entitled to an injunction but might be entitled to damages." Ill. Rev. Stat. ch. 26, 2-725 (1961), Illinois Code Comment, p.614.

3 Federal Rule of Civil Procedure 15 is a procedural rule properly applied by a federal district court exercising diversity jurisdiction over a lawsuit, even though the federal court applies a state law statute of limitation. Johansen v. E.I. Du Pont De Mours & Co., 810 F.2d 1377 (5th Cir. 1987), cert. denied, 484 U.S. 849 (1987).

In Malawy, the plaintiff also underwent surgery for the implantation of a [*9] synthetic rod to immobilize a fractured femur. That rod broke and the plaintiff again underwent surgery. The hospital at which the surgery was performed retained the broken rod. The plaintiff sued both the hospital and a manufacturer of synthetic rods. The plaintiff subsequently discovered that he had sued the wrong manufacturer and amended his complaint to allege a cause of action against the correct manufacturer. The manufacturer argued that it had not received adequate notice of the breach for purposes of Section 2-607(3), which requires that the buyer give the seller reasonable notice of a breach or be barred from any remedy. The Malawy court held that Section 2-607(3) merely required the plaintiff to give adequate notice of the breach to his immediate seller (the hospital) and that the plaintiff's amendment to add the correct manufacturer upon discovery of the identity of the manufacturer was sufficient. In Malawy, however, the plaintiff timely filed both his complaint and his amended complaint. The facts of Malawy are therefore, distinguishable from the facts presented in this case. Rule 15 requires that there be actual notice to the defendant prior to the running of [*10] the statute of limitation or else the result is prejudice to the defendant through deprivation of the defense of the statute of limitation. Williams v. U.S. Postal Service, 873 F.2d 1069 (7th Cir. 1989). Therefore, Section 2-607(3) notice, is not equivalent to sufficient notice for purposes of Federal Rule of Civil Procedure 15(c) and Synthes' motion for summary judgment must be granted.

III. CONCLUSION

Synthes' motion for summary judgment as to Count III of the Amended Complaint is granted.

Date: March 29, 1990

LEXSEE

TOEHL HARDING, Plaintiff, - against - DAVID NASEMAN, Defendant.

07 Cv. 8767 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 92813

November 13, 2008, Decided
November 14, 2008, Filed

SUBSEQUENT HISTORY: Findings of fact/conclusions of law at, Judgment entered by Harding v. Naseman, 2009 U.S. Dist. LEXIS 58149 (S.D.N.Y., July 8, 2009)

PRIOR HISTORY: Harding v. Naseman, 2008 U.S. Dist. LEXIS 65341 (S.D.N.Y., Aug. 25, 2008)

COUNSEL: [*1] For Toehl Harding, Plaintiff, Counter Defendant: Jennifer L. Baker, Kent R. Robison, LEAD ATTORNEYS, Robison, Belaustegui, Sharp & Low, Reno, NV; Judd Burstein, Judd Burstein, P.C., New York, NY.

For David Naseman, Defendant, Counter Claimant: Jay Stephen Peek, LEAD ATTORNEY, Hale Lane Peek, et al, Las Vegas, NV; Patricia Halstead, LEAD ATTORNEY, Hale Lane Peek, et al, Reno, NV; Dan Rottenstreich, Kirkland and Ellis LLP, Palo Alto, CA; Deborah Eisner Lans, Robert Stephan Cohen, Ryan Weiner, Cohen Lans LLP, New York, NY.

JUDGES: ROBERT P. PATTERSON, JR., United States District Judge.

OPINION BY: ROBERT P. PATTERSON, JR.

OPINION

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff Toehl Harding filed this lawsuit in connection with a dispute over a property settlement agreement ("PSA") that was negotiated between Plaintiff and her ex-husband, Defendant David Naseman, in connection with their 1993 divorce. Plaintiff complains, in essence, that Defendant fraudulently misrepresented the amount of assets he held when he entered into divorce negotiations with Plaintiff. The core of Plaintiff's complaint is her assertion that, during property settlement negotiations, Defendant concealed the amount of their joint [*2] 1990 income by providing Plaintiff with false 1990 federal income tax forms that listed their joint income as $ 1,323,916, while in actuality, by reason of this nondisclosure of his income, it was $ 5,561,728. Discovery having closed on June 30, 2008, Defendant moves for summary judgment against Plaintiff, asking this Court to dismiss all of Plaintiff's claims, both those that sound in fraud (Claims 1-3), and those that do not. (Claims 4-12.) [1]

1 A number of documents and exhibits are referred to throughout this opinion. "Compl." refers to Plaintiff's January 12, 2007 complaint; "Def.'s Mot." refers to Defendant's May 2008 motion for summary judgment; "Pl.'s Reply" refers to Plaintiff's June 20, 2008 memorandum in opposition to Defendant's motion; "Harding Aff." refers to Plaintiff's June 18, 2008 affidavit in opposition; "Bothe Aff." refers to Marcia Bothe's June 17, 2008 affidavit in opposition; "Schalk Aff." refers to Plaintiff's counsel's June 20, 2008 affidavit in opposition; "Naseman Aff." refers to Defendant's May 28, 2008 affidavit in support of his motion; "Naseman Reply Aff." refers to Defendant's June 8, 2008 reply affidavit in support of his motion; "Def.'s Ex." refers to [*3] the exhibits submitted by Defendant to the Court on May 28, 2008; "Tr." refers to the minutes from the oral argument held before this Court on September 29, 2008; "Def.'s Rule 56.1" refers to Defendant's May 28, 2008 Rule 56.1 Statement of Material Facts Not in Dispute; "Pl.'s Rule 56.1" refers to Plaintiff's June 23, 2008 Rule

56.1 Statement of Material Facts Not in Dispute, and; "Def.'s Dep." refers to Defendant's May 12, 2008 Deposition by Plaintiff's counsel.

For the reasons set forth below, Defendant's motion for summary judgment against Plaintiff is granted in part and denied in part. Plaintiff's fraud-based claim may proceed to trial or settlement, while her remaining claims are dismissed.

1. Relevant Facts:

Plaintiff's Claim:

Plaintiff and Defendant, both attorneys, started dating in 1980 and were married in October 1982. (Def.'s Rule 56.1 P1; Pl.'s Rule 56.1 P1; Harding Aff. P6.) After marrying, they lived in New York City, first renting and then owning an apartment located at 425 East 51st Street. (Harding Aff. PP7, 11-12.) Defendant worked as a General Counsel at LIN Broadcasting Company, while Plaintiff worked as a General Counsel for the NYNEX Corporation. (Harding Aff. PP9, [*4] 33; Pl.'s Rule 56.1 P5.) As part of Defendant's pay package, he was granted stock options in LIN. (Harding Aff. PP3-4, 15-16; Def. Ex. 8.) In 1987, these options were worth approximately $ 2 million. (Harding Aff. PP13-14; Def. Ex. 5.) Defendant exercised the "vast majority" of his options in 1988, and used approximately $ 750,000 from the proceeds to pay off the mortgages on the couple's New York City apartment, their farmhouse in Massachusetts, and a residence in Michigan. (Harding Aff. PP16, 18.) The remainder of the options proceeds, approximately $ 1 million, was deposited in a joint account at Republic National Bank. (Harding Aff. P17.) [2]

2 As a result of the exercise of the stock options, the couple's income increased from $ 284,123 in 1987 to $ 2,486,666 in 1988. (Harding Aff. P21-22.)

During their marriage, Defendant prepared the parties' joint tax returns. (Harding Aff. P23.) Commencing in 1988, Defendant asked Plaintiff to sign her name to blank tax forms (IRS Form 1040) because Plaintiff "was often away on business," and Defendant would then be able to complete and file the tax returns himself while she was away. (Harding Aff. PP22-23.)

In 1989, McCaw Communications purchased [*5] LIN Communications, making any unexercised options potentially very valuable. (Harding Aff. PP24-26.) Plaintiff was aware that Defendant had received a "buyout package" as part of the McCaw takeover of LIN. (Id. P28.) Plaintiff asked Defendant how much money he was due to receive; he told her that because he had exercised the majority of his options in 1988, he would now get "very little." (Id. P26.) Because of Defendant's statements, Plaintiff believed that Defendant would receive a buyout package in the "hundreds of thousands of dollars range," but not in the "millions." (Id. PP27-28.)

In August of 1992, Defendant moved to Nevada and told Plaintiff he wanted a divorce. (Harding Aff. P32.) Both parties hired counsel to negotiate a property settlement; by letter dated February 5, 2003, Plaintiff's counsel requested all of Defendant's investments, bank accounts, and tax forms for the years 1987-1991. (Harding Aff. P38; Schalk Aff. at TH790 [letter].) [3] Plaintiff was facing a "perilous financial future" due to the "impending loss" of her job; therefore, throughout these negotiations, Plaintiff told Defendant "repeatedly and unequivocally" that she "expected to receive 50% of the marital [*6] assets." (Harding Aff. PP34, 36-37; Pl.'s Rule 56.1 P26.) Plaintiff's expectation for receiving 50% of the marital assets was confirmed in a letter her counsel sent to Defendant. (Harding Aff. P37; Pl.'s Rule 56.1 P22.)

3 "TH790" refers to the bate-stamped page contained in the Schalk Affidavit as submitted by Plaintiff.

During the negotiations over the divorce settlement agreement, Plaintiff reviewed copies, furnished by Defendant, of their joint tax returns for the years 1987 through 1991. (Harding Aff. P39; Pl.'s Rule 56.1 P28.) Plaintiff did not recall seeing any 1991 tax return reporting more than $ 5 million in income, and she states that there was "no way" Plaintiff would have missed seeing a tax return reporting such an unusually large amount of income. (Harding Aff. PP39-40; Pl.'s Rule 56.1 PP26, 28.) The couple was granted a divorce in Nevada on April 21, 1993, and, as required by the divorce decree, on May 4, 1993 Plaintiff and Defendant signed a Property Settlement Agreement ("PSA"), which was filed with the Nevada court. [4] (Def.'s Rule 56.1 PP7-8; Pl.'s Rule 56.1 PP7-8.) It was Plaintiff's belief, when she signed the PSA, that she was being provided with "approximately 50% [*7] of the marital estate." (Harding Aff. P40; Pl.'s Rule 56.1 P26.)

4 Specifically, the April 21, 1993 Decree of Divorce provided that "upon execution of a marital settlement agreement by the parties, these proceedings shall be concluded in their entirety." (Naseman Reply Aff. Ex. D [Divorce Decree].)

Under the terms of the PSA, Plaintiff received the condominium she shared with Defendant in New York (valued at $ 500,000), $ 500,000 from their joint checking account, and all of the stock and bank accounts held in her own name. (Def's Rule 56.1 P24; Harding Aff. P42.) Based upon the representations made by Defendant during the negotiations over the PSA, Plaintiff

believed that the proceeds from the exercise of the stock options had been "accounted for," and that she had received "slightly more than 50%" of the "marital pie" in the PSA. (Harding Aff. P41; Pl's Rule 56.1 P26.) Defendant's notes made during the time the PSA was negotiated indicated that he believed that he was receiving 74.78% of the marital pie, worth approximately $ 3.8 million, [5] while leaving the remaining 25.22%, worth $ 1 million, for Plaintiff. (Def.'s Dep. at 26; Schalk Aff. at TH817 [notes].)

5 The majority of these assets [*8] were hidden in an undisclosed Shearson Lehman Brothers account and in an undisclosed Republic National Bank account. (Harding Aff. at P3.)

In June 1993, three months after his divorce from Plaintiff, Defendant married Marcia Bothe. (Bothe Aff. P5.) Defendant filed for divorce from Bothe in 2005, and, according to Bothe, in connection with those divorce proceedings, Defendant provided Bothe with "incomplete financial information and tax returns." (Bothe Aff. P6.) Bothe, however, looked through numerous filing cabinets located in the house she shared with Defendant, and found two separate 1990 signed income tax returns, one showing a gross income of $ 1,323,916, and the other showing an income of $ 5,561,728. (Bothe Aff. P6; Bothe Aff. Exs. 1-2 [$ 1 million tax forms]; Harding Aff. Exs. 3-4 [$ 5 million tax forms].)

On January 18, 2006, Bothe telephoned Plaintiff and asked her whether she and Defendant had earned over $ 5 million in 1990. (Harding Aff. at P47; Harding Aff. Ex. 1 [note of call]; Bothe Aff. P9.) Plaintiff told Bothe that they never "earned anything close to $ 5 million," and it was at that point that Bothe told Plaintiff about the two 1990 income tax returns. (Harding Aff. [*9] PP47-48; Bothe Aff. P9.) This was the first time that Plaintiff had heard about the existence of the $ 5 million income tax return. (Harding Aff. P41.) Bothe then sent copies of these returns to Plaintiff, along with a letter written by Defendant at the time of the parties' divorce negotiations indicating that Plaintiff "fe[lt]" that she had "won" by "taking most of everything." (Harding Aff. PP42, 48; Harding Aff. Ex. 2 [shipping invoice]; Bothe Aff. PP9-10; Bothe Aff. Ex. 4 [letter].) Upon receipt of these returns, Plaintiff concluded that the $ 5 million federal income tax return was the correct one filed with the IRS, while the $ 1 million tax return was the one presented to Plaintiff during their divorce negotiations to disguise the couple's true earnings. (Harding Aff. P49.) [6]

6 The $ 4 million in income difference on the 1990 tax returns stemmed from Defendant's exercise of undisclosed stock options he had been granted in connection with the takeover of LIN by McCaw Communications. (Harding Aff. P41-42.) Subsequent analysis performed by an expert witness hired by Plaintiff concluded that the $ 5 million tax return was a copy of the original tax form signed by Plaintiff, while [*10] the $ 1 million tax return had been fraudulently created; the signatures on that tax form had been copied from the $ 5 million tax return. (Schalk Aff. Ex. C [report of expert witness Gus Lesnevich].)

Plaintiff now alleges that because of Defendant's "fraudulent misrepresentations and fraudulent concealment," she was "fraudulently induced into signing the PSA by which the parties divided and distributed their marital property." (Harding Aff. P27-28.) As a result of Defendant's deceit, Defendant captured "75% of the 'marital pie' for himself, while he nonetheless made it appear" that Plaintiff "was receiving slightly more than 50%." (Harding Aff. P41.) Plaintiff's complaint, originally filed in Nevada, contains claims based on fraud, alleging fraudulent misrepresentation and fraudulent concealment (Compl. PP59-97), as well as a number of other claims against Defendant, alleging: breach of a fiduciary duty, breach of contract, negligent misrepresentation, contractual and tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, conversion, constructive trust/equitable lien, fraud on the court, and constructive fraud. (Compl. PP98-152.)

Defendant's Claim:

Defendant [*11] does not dispute the central aspects of his relationship with Plaintiff, but he denies committing any fraud pertaining to the property settlement agreement. (Naseman Aff. PP2-4; Naseman Reply Aff. PP4-7.) Specifically, Defendant contends that Plaintiff knew or should have known about the exercise of his stock options in 1990, and that therefore, she was aware of his $ 5 million income for that year. (Naseman Aff. PP9-12, 13-16; Naseman Reply Aff. PP5-12; Def.'s Dep. at 21.) Defendant also contends that he never created false tax returns for 1990, and that he had given Plaintiff the $ 5 million tax return prior to filing and before she signed the PSA in 1993. (Naseman Aff. P16; Naseman Reply Aff. P5.) [7] An expert witness hired by Defendant concluded that the 1990 tax form showing $ 5 million was the original tax form that had been signed by Defendant and Plaintiff, while the tax form for $ 1 million was an "altered document that someone prepared by 'cutting' the signature block out of the accurate 1990" form and pasting it into the "fraudulent return." (Naseman Aff. P16; Speckin Affidavit PP5-12; Def. Ex. 10 [1990 tax form].)

7 Defendant claimed during his May 12, 2008 deposition, however, [*12] that he had not provided Plaintiff with any tax returns during the negotiations over the PSA. (Def.'s Dep. at 34-35.)

2. Discussion

While both parties agree that the 1990 tax return for $ 1 million was fraudulent, Plaintiff argues that Defendant created the doctored tax returns to defraud her during the course of negotiations of their PSA, while Defendant claims that his second ex-wife, Marcia Bothe, is to blame. (Harding Aff. PP39-41; Naseman Aff. P16 fn. 2.) In his motion seeking summary judgment, Defendant argues that Plaintiff's fraud-based claim should be dismissed because: 1) a party who has ratified a separation agreement may not thereafter sue her ex-spouse for additional monies in connection with that agreement; 2) Plaintiff's current lawsuit is barred by the broad releases from liability contained in the PSA; and, 3) the claims are time-barred. (Def's Mot. at 11-14, 16-19.) [8] Defendant also contends that Plaintiff's non-fraud based claims must be dismissed because they are barred by the statutes of limitations and are not legally cognizable. (Def's Mot. at 20-22.)

8 In his motion seeking summary judgment, Defendant further argued that Plaintiff's complaint should be dismissed [*13] because the attorneys had previously reached a binding agreement to settle this case. (Def's Mot. at 7-11.) However, during the September 29, 2008 oral argument, this Court found that there was no "clear agreement between the attorneys" to settle the case. (Tr. at 21.) Rather, it was an "issue of fact as to whether there was a settlement." (Id.) Accordingly, Defendant's motion seeking summary judgment on that ground is denied.

Summary judgment may be granted if the pleadings demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). But "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita v. Zenith, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The Court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there [*14] is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). With this standard in mind, each of Defendant's arguments will be considered in turn.

A. Plaintiff's Non-Fraud Based Claims Are Dismissed.

Plaintiff has filed a number of claims not based on fraud, alleging: a breach of a fiduciary duty, negligent misrepresentation, breach of contract, contractual and tortious breach of the implied covenant of good faith and fair dealing, unjust enrichment, conversion, constructive trust/equitable lien, and fraud on the court. (Compl. at 14-21.)

These non-fraud based claims are dismissed because each of the aforementioned claims is governed by either a six or three-year statute of limitations, both of which have long since expired. See N.Y. Civil Practice Law and Rules ("CPLR") § 213(2) (six-year statute of limitations period for contract claims, including implied covenants of good faith and faith dealing); N.Y. CPLR § 213(1) (six-year statute of limitations period concerning actions for which no period is specifically prescribed by law); Mancini v. Hardscrabble Commons Assoc., 31 A.D.3d 719, 820 N.Y.S.2d 284 (N.Y. App. Div. 2d Dep't 2006) (six-year statute of limitations period for [*15] breach of a fiduciary duty claim); Elliott v. Qwest Communications Corp., 25 A.D.3d 897, 808 N.Y.S.2d 443 (N.Y. App. Div. 3d Dep't 2006) (six-year statute of limitations period for unjust enrichment); Fandy Corp. v. Lung-Fong Chen, 262 A.D.2d 352, 691 N.Y.S.2d 572 (N.Y. App. Div. 2d Dep't 1999) (six-year statute of limitations period for negligent misrepresentation claim); In re Wallace, 191 A.D.2d 638, 595 N.Y.S.2d 230 (N.Y. App. Div. 2d Dep't 1993) (six-year statute of limitations period governs claims for constructive trust); Stacom v. Wunsch, 173 A.D.2d 401, 570 N.Y.S.2d 32 (N.Y. App. Div. 1st Dep't 1991) (tort claims subject to three-year statute of limitations period); Bank Leumi Trust Co. v. John Malasky, Inc., 108 A.D.2d 1089, 485 N.Y.S.2d 868 (N.Y. App. Div. 3d Dep't 1985) (actions for conversion governed by three-year statute of limitations).

Accordingly, all of Plaintiff's non-fraud based claims are dismissed. [9]

9 Plaintiff argues that Defendant misrepresented and/or concealed marital assets and income that were subject to division and distribution by the Nevada Court, and therefore, committed fraud on the court. (Compl. at 19-20.) While any fraud on the court can be taken into account in determining whether to vacate a judgment or agreement, Plaintiff has cited [*16] no authority that under New York law fraud on the court is a separate cause of action available to a plaintiff.

B. Plaintiff's Fraud-Based Claim.

i. Plaintiff's fraud claim is not barred by her failure to seek recission of the PSA.

Plaintiff claims that by misrepresenting his income and assets, Defendant committed fraud which induced her into signing the PSA negotiated in connection with their divorce. (Pl.'s Reply at 7-8.) Defendant counters that Plaintiff "accepted all of the considerable benefits" of the PSA for the 14 years "preceding the commencement of this lawsuit," and even now, more than two years since discovering his alleged fraud, Plaintiff has not "tendered back" any of the benefits provided to her through the PSA. (Def.'s Mot. at 14.) Hence, Defendant concludes, by not rescinding the agreement and returning any of the assets she received pursuant to the PSA, Plaintiff has effectively ratified the PSA, and therefore, her current fraud claim is "now barred." (Id.; Def.'s Reply Mot. at 4-7.)

Plaintiff responds that she did not know about the fraud for the first 14 years of the PSA's existence, and that she filed suit to modify the PSA within a year after she discovered the fraud. [*17] Plaintiff acknowledges that she is not seeking to "rescind the PSA," but rather, she is "bring[ing] an action sounding in fraud for the difference between a fair and honest divorce settlement and her fraudulently induced one." (Pl.'s Reply at 8.)

New York contract law is clear that "one who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement." Slotkin v. Citizens Casualty Co., 614 F.2d 301, 312 (2d Cir. 1979); Urtz v. New York C. & H.R.R. Co., 202 N.Y. 170, 95 N.E. 711 (N.Y. 1911); Clearview Concrete Products v. S. Charles Gherardi, Inc., 88 A.D.2d 461, 466, 453 N.Y.S.2d 750 (N.Y. App. Div. 2d Dep't 1982); Byrnes v. National Union Insurance, 34 A.D.2d 872, 310 N.Y.S.2d 781 (N.Y. App. Div. 3d Dep't 1970); Griffel v. Belfer, 12 A.D.2d 609, 209 N.Y.S.2d 67 (N.Y. App. Div. 1st Dep't 1960). In such circumstances, the measure of damages is "the difference between what would have been a fair and honest settlement and the amount ... accepted in reliance on the alleged misrepresentations of defendant." Griffel, 12 A.D.2d at 609.

The principle behind allowing claims of fraud without requiring recission is clear. "If all that will result from a misrepresentation [inducing a settlement] is a new [*18] trial, then the party making it has everything to gain and nothing to lose. The plaintiffs would be placed at a disadvantage by a new trial; the defendants would not." Slotkin, 614 F.2d at 312. Neither Defendant nor Plaintiff have put forward any New York cases which address whether the recognized principle that a Plaintiff "who has been induced by fraudulent misrepresentation to settle a claim may recover damages without rescinding the settlement," is applicable to negotiated divorce property settlement agreements, and Defendant has failed to set forth any grounds for finding a distinction with respect to negotiated property settlement agreements.

In Slotkin, the court pointed out that a "remedy which merely seeks to place the plaintiff back in the position [s]he was in before [the negotiated agreement] seems hardly adequate." Slotkin, 614 F.2d at 312. The Court can think of no grounds for reaching a different conclusion in considering divorce property settlement agreements. Indeed, to require Plaintiff to void the divorce property settlement agreement and disgorge the previously received property, as Defendant, in bringing a ratification defense, here claims, could result in an inequitable [*19] situation. Accordingly, it is proper for the plaintiff who brings a suit for fraud in the inducement to retain the proceeds from the negotiated settlement agreement and then request damages that are "the difference between what would have been a fair and honest settlement and the amount ... accepted in reliance on the alleged misrepresentations of defendant." Griffel, 12 A.D.2d at 609. Defendant's claim that Plaintiff may not bring her fraud claim without rescinding the PSA is denied.

ii. Plaintiff's fraud claim is not barred by the terms and conditions of the PSA.

In his motion to dismiss, Defendant argues that the release and waiver provisions in the 1993 PSA bar the current lawsuit by Plaintiff. (Def.'s Mot. at 11-12, 14-16.) In that agreement, the parties each agreed to broad omnibus releases and waivers. Each party released and discharged the other from "including (without limitation) all actions ... with respect to all separate property and all marital property." See PSA Article 8(2). It also provided that the parties had "waive[d] ... all rights or claims ... which [they] may have to an award of equitable distribution or distributive award in respect of any property now or previously [*20] owned ... by the other spouse." See PSA Article 7(2).

Under New York law, a valid release or waiver constitutes a complete bar to an action on a claim which is the subject of the release. See Global Materials and Metals Corp. v. Holme, 35 A.D.3d 93, 98, 824 N.Y.S.2d 210 (N.Y. App. Div. 1st Dep't 2006); Metals Hack v. United Capital Corp., 247 A.D.2d 300, 301, 669 N.Y.S.2d 280 (N.Y. App. Div. 1st Dep't 1998); Metz v. Metz, 175 A.D.2d 938, 939, 572 N.Y.S.2d 813 (N.Y. App. Div. 3d Dep't 1991); Matter of O'Hara, 85 A.D.2d 669, 445 N.Y.S.2d 201 (N.Y. App. Div. 2d Dep't. 1981) (valid general release bars suit on any cause of action arising prior to the date of its execution); see also Allen v. Westpoint-Pepperell, 945 F.2d 40, 44 (2d Cir. 1991);

Branch v. Wassel, 779 F. Supp. 310, 319 (S.D.N.Y. 1991); National Union Fire Ins. Co. v. Walton Ins. Ltd., 696 F. Supp. 897, 901 (S.D.N.Y. 1988). And where the "language" of a settlement agreement "is clear, effect must be given to the intent of the parties as indicated by the language employed." Rocanova v. Equitable Life, 83 N.Y.2d 603, 616, 634 N.E.2d 940, 612 N.Y.S.2d 339 (N.Y. 1994); Metz, 175 A.D.2d at 939 (same); see also Denburg v. Parker Chapin, 82 N.Y.2d 375, 383, 624 N.E.2d 995, 604 N.Y.S.2d 900 (N.Y. 1993) ("strong [*21] policy considerations favor the enforcement of settlement agreements").

However, otherwise valid releases or waivers may be set aside on the traditional bases of fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress. Mangini, 24 N.Y.2d at 563; Lobel v. Maimonides Med. Ctr., 39 A.D.3d 275, 276, 835 N.Y.S.2d 28 (N.Y. App. Div. 1st Dep't 2006) (in denying motion for summary judgment, held that "release may be voided on the basis of fraud in the inducement, even when it results from prolonged negotiations by represented parties"); Global Materials and Metals Corp., 35 A.D.3d at 98; see also C3 Media and Marketing v. Firstgate Internet, 419 F. Supp. 2d 419, 429 (S.D.N.Y. 2005); Knoll v. Equinox Fitness Clubs, 2003 U.S. Dist. LEXIS 23086, at *21 (S.D.N.Y. 2003). This principle applies regardless of whether the contract involves a complex commercial dispute, or, as pertinent here, matrimonial-related property settlement agreements. See, e.g., Littman v. Magee, 54 A.D.3d 14, 17, 860 N.Y.S.2d 24 (N.Y. App. Div. 1st Dep't 2008) ("broad omnibus release" did not bar Plaintiff's claim of fraudulent inducement); Chapin v. Chapin, 12 A.D.3d 550, 786 N.Y.S.2d 65 (N.Y. App. Div. 2d Dep't 2004) (waiver did not bar [*22] the plaintiff's claim of fraudulent inducement in divorce property settlement); Cruciata v. Cruciata, 10 A.D.3d 349, 780 N.Y.S.2d 761 (N.Y. App. Div. 2d Dep't 2004); Metz, 175 A.D.2d at 938; Cherfas v. Wolf, 17 Misc. 3d 1102A, 851 N.Y.S.2d 57 (N.Y. Sup. Ct. King's Co. 2007).

This principle is particularly applicable here because Defendant owed Plaintiff, his wife, a fiduciary duty during the negotiations over the PSA. See Magee, 54 A.D.3d at 14 (plaintiff was entitled to expect the defendants to disclose any information in their possession that could reasonably bear on the plaintiff's consideration of the defendants' offer because "when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make full disclosure of all material facts"); see also Colello v. Colello, 9 A.D.3d 855, 859, 780 N.Y.S.2d 450 (N.Y. App. Div. 4th Dep't 2004) (husband had fiduciary duty to his wife); Blue Chip Emerald v. Allied Partners, 299 A.D.2d 278, 279, 750 N.Y.S.2d 291 (N.Y. App. Div. 1st Dep't 2002) (fiduciary is obligated to make "full disclosure" of all material facts).

Other provisions in the PSA likewise do not bar Plaintiff's current fraud [*23] claim. In the PSA Article 13(4) Plaintiff acknowledged her satisfaction that "full disclosure ha[d] been made, and that she cannot appropriately make a claim against [Defendant] by reason of his failure to disclose or her failure of knowledge of the financial circumstances of [Defendant]." This clause, however, says nothing about the unique situation presented here, where Defendant failed to disclose a newly opened security account and bank accounts and purportedly made full disclosure of his 1990 income by providing a "copy" of a self-authenticating document -- their joint income tax returns -- whereas in actuality, this "disclosure" was intended to deceive Plaintiff. Indeed, the PSA does not contain a disclaimer of reliance on any oral or written statements or documents (the tax returns) produced by Defendant.

Additionally, even though in Article 13(6) of the PSA Plaintiff represents that the Agreement was entered into freely and "without fraud," this was simply a representation made by Plaintiff as to her knowledge at that time; it was not a waiver of her right to sue for fraud on knowledge which came to her attention later. Since Plaintiff alleges reliance on Defendant's disclosure [*24] and asserts that she "did not have express knowledge of [Defendant's] assets, she cannot be said to have waived her right" to vacate or modify the PSA. Chapin, 12 A.D.3d at 550.

These circumstances extinguish any similarity to the situation in Kojovic v. Goldman, 35 A.D.3d 65, 823 N.Y.S.2d 35 (N.Y. App. Div. 1st Dep't 2006), a case relied upon by Defendant. In Kojovic, the plaintiff moved to rescind the property settlement agreement based on the defendant's alleged misrepresentation of the value of his ownership stake in an IT company. The court granted summary judgment to the defendant because his equity stake, although not the exact value, had been fully disclosed to the plaintiff during settlement negotiations, and the terms of the agreement provided that the Plaintiff had "specifically acknowledged that she had made her own independent investigation of [the defendant's] business affairs and was waving further disclosure." Hence in Kojovic, after being accurately informed by the defendant of the identity of his assets, the agreement put the burden on the plaintiff to correctly appraise the assets.

In the final analysis, this case is more akin to Chapin v. Chapin, 12 A.D.3d 550, 786 N.Y.S.2d 65 (N.Y. App. Div. 2d Dep't 2004), [*25] where, despite the wife's general release and waiver of her right to vacate the

settlement agreement, the court set aside the agreement as the product of fraudulent inducement because the husband claimed during settlement negotiations to have virtually no assets and he concealed the fact that he had recently purchased valuable real estate. It is also consistent with the broader rule that where the "alleged misrepresentations supporting a claim of fraud arise from facts within the 'peculiar knowledge' of a party, even a specific disclaim as to reliance on those representations does not bar a fraud claim." Solutia Inc. v. FMC Corp., 385 F. Supp. 2d 324, 341 (S.D.N.Y. 2005); see also Warner Theatre Assocs. v. Metro Life, 149 F. 3d 134, 136 (2d Cir. 1998); Tahini Investment Ltd. v. Bobrowsky, 99 A.D.2d 489, 490, 470 N.Y.S.2d 431 (N.Y. App. Div. 2d Dep't 1984) (even where parties specifically disclaim reliance on seller's misrepresentations, waiver does not apply if facts are particularly within knowledge of party making them). Defendant's 1990 income as stated on the income tax forms that he submitted to the IRS fell within his "peculiar knowledge," as did his knowledge of his undisclosed bank and security [*26] accounts.

Accordingly, the terms and conditions of the PSA do not bar Plaintiff's current fraud claim against Defendant, and Defendant's request for summary judgment on this ground is denied.

iii) The Applicable Statute of Limitations Does Not Bar Plaintiff's Fraud-Based Claims.

Defendant next argues that Plaintiff's fraud-based cause of action must be dismissed because it is barred by the applicable statute of limitations. (Def.'s Mot. at 16-19.) Under New York law, claims based on fraud must be brought within "the greater of six years from the date the cause of action accrued or two years from the time the Plaintiff ? discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8); Prestandrea v. Stein, 262 A.D.2d 621, 622, 692 N.Y.S.2d 689 (N.Y. App. Div. 2d Dep't 1999). Here, Plaintiff seeks to rely on the two-year discovery rule, arguing that she filed her lawsuit less than two years after Defendant's second ex-wife Marcia Bothe informed her of the alleged fraud. [10] In response, Defendant contends that Plaintiff, by the exercise of "reasonable diligence," should have known about any alleged fraud at the outset.

> 10 According to her papers, Plaintiff discovered the [*27] fraud on January 21, 2006, and she filed her complaint on January 12, 2007, well within the two-year deadline.

The test as to when a plaintiff should have discovered an alleged fraud is an objective one. Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441-443, 293 N.E.2d 76, 340 N.Y.S.2d 902 (N.Y. 1972); Prestandrea, 262 A.D.2d at 621. As the Second Circuit has declared, "[w]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." Armstrong v. McAlpin, 699 F.2d 79, 88 (2d Cir. 1983).

In support of his motion to dismiss, Defendant primarily points to his 1991 tax forms, copies of which he submitted to the Court and which bear the signatures of both Defendant and Plaintiff. (Naseman Reply Aff. Ex. B [1991 tax forms]; Naseman Reply Aff. PP5-6.) There was more than $ 145,000 in dividend income on these returns, which was more than ten times the amount reported on the 1990 tax form, and which was derived from the profit from his options [*28] in 1990. (Naseman Reply Aff. Ex. B; Naseman Reply Aff. PP6-8.) Further, Defendant contends, two bank accounts he had allegedly hidden from Plaintiff and which contained a substantial amount of "hidden" assets, were also listed on this form. (Naseman Reply Aff. PP6-10.) Furthermore, Defendant asserts, McCaw's takeover of LIN was a story that received widespread attention in the press, and a proxy statement filed with the Securities and Exchange Commission detailed exactly how many options Defendant had been awarded by LIN. (Def. Ex. 8 [proxy statement]; Naseman Reply Aff. PP16-17.) Thus, Defendant concludes, Plaintiff should have known, when she entered into the settlement agreement, that Defendant had received significant income in 1990 from the takeover of his company by McCaw. (Naseman Reply Aff. PP12, 21.)

Plaintiff argues that she exercised "reasonable diligence" prior to entering into the settlement agreement and thereafter she did not discover any of Defendant's alleged fraud. At the very least, it is clear from both Defendant and Plaintiff's presentation of their respective versions of events that it is a questiion of fact as to whether Plaintiff exercised "reasonable diligence" [*29] to discover the alleged fraud. This question of fact should be determined at trial, and not through avernments in a motion for summary judgment. See Silvershein v. Furman, 1997 U.S. Dist. LEXIS 12909, *20-21 (S.D.N.Y. 1997) ("question of fact as to whether person of ordinary intelligence would have known that they had been defrauded"); see also Todd v. Pearl Woods, 20 A.D.2d 911, 248 N.Y.S.2d 975 (N.Y. App. Div. 2d Dep't 1964) ("where, as here alleged, the facts were peculiarly within the knowledge of the defendants and were willfully misrepresented, the failure of the plaintiffs to ascertain the truth by inspecting public

records is not fatal to their actions"). Accordingly, Defendant's motion for summary judgment based on his statute of limitations defense is denied.

In sum, Plaintiff's claims of fraudulent misrepresentation and fraudulent concealment may proceed to trial or settlement. The parties shall submit a pretrial order, *voir dire* requests and request to charge the jury by Monday, November 24, 2008, with trial to commence shortly thereafter.

IT IS SO ORDERED.

Dated: New York, New York

November 13, 2008

/s/ Robert P. Patterson, Jr.

Robert P. Patterson, Jr.

U.S.D.J.

LEXSEE

ETHEL HARE and FRED HARE, Individually and as Power of Attorney for Ethel Hare, Plaintiffs, vs. HOVEROUND CORPORATION, Defendant.

06-CV-1081 (NAM/GHL)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 87146; CCH Prod. Liab. Rep. P18,306

September 22, 2009, Decided
September 23, 2009, Filed

COUNSEL: [*1] Ethel Hare, Plaintiffs, Pro se, Mexico, New York.

For Defendant: John H. Pennock, Esq., OF COUNSEL, Pennock, Breedlove Law Firm, Clifton Park, New York.

JUDGES: Hon. Norman A. Mordue, Chief United States District Judge.

OPINION BY: Norman A. Mordue

OPINION

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs Ethel Hare and Fred Hare ("plaintiffs") bring this diversity action, *pro se*, against defendant Hoveround Corporation ("defendant" or "Hoveround") seeking damages for personal injuries allegedly sustained by Ethel Hare. Presently before the Court is defendant's motion for summary judgment and dismissal of plaintiffs' complaint. (Dkt. No. 36). Plaintiffs oppose the motion. (Dkt. No. 42).

II. FACTUAL BACKGROUND [1]

1 The facts set forth in this section are taken from: (1) the Complaint; (2) the Answer; (3) Defendant's Statement of Undisputed Facts; and (4) the exhibits and evidence submitted by defendant in support of their Motion for Summary Judgment.

On January 30, 2003, plaintiffs took delivery of a Teknique Power Wheelchair, Model TEK FWD. The Teknique wheelchair was designed and manufactured by defendant and delivered for use by Ethel Hare. As Ethel Hare's power of attorney, plaintiff Fred Hare signed Ethel Hare's [*2] name to the Hoveround Corporation Delivery Ticket. The Delivery Ticket provided a list and description of the items that plaintiffs received including the TEK FWD, a TEK battery, a seat belt, MPV4 & Scooter Charger, a non-reclining seat and a footplate. The Delivery Ticket also contained a Client Orientation Checklist which indicated that plaintiffs received safety information for the motorized wheelchair including: home safety information; a safety recommendation form; safety training on wheelchair ramp use; client bill of rights; client responsibilities; Hoveround policy regarding advance directives and medical emergencies; disaster readiness information; warranty information; an owner's manual; unit charging instructions and important telephone numbers. The Delivery Ticket contained the following statement above Fred Hare's signature:

> I certify that I have received the equipment listed above from the Hoveround Corporation. I also certify that I have been instructed in the proper care and the safe use of the above equipment. I have received written information pertaining to the topics outlined above in the client orientation checklist.

Despite the language in the Delivery Ticket, Fred [*3] Hare testified that he did not read the entire Delivery Ticket before he signed Mrs. Hare's name.

Upon delivery, plaintiffs were provided with a Teknique Power Wheelchairs Owner's Manual/Warranty, version code D82005582. The last page of the Owner's Manual, page 47, is entitled Limited Warranty. The

Limited Warranty contained the following pertinent language:

> Limitations and exclusions:
>
> THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER EXPRESS WARRANTIES, IMPLIED WARRANTIES, IF ANY, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND SHALL NOT EXTEND BEYOND THE DURATION OF THE EXPRESS WARRANTY PROVIDED HEREIN.

Plaintiffs allege that on June 18, 2004, Ethel Hare sustained injuries as a result of fall involving the wheelchair. During her deposition, Ethel Hare could not recall where the accident happened and stated that she could not remember the accident at all. [2]

> 2 The Court has reviewed the record in its entirety and finds no evidence or information concerning plaintiff's accident. The Court will discuss this issue *infra*.

III. THE COMPLAINT

In the complaint, plaintiffs claim that on June 18, 2004, at approximately 4:00 [*4] p.m., while Ethel Hare was riding in the wheelchair, the wheelchair tipped over causing her to sustain injuries. Specifically, plaintiffs allege that due to the instability of the wheelchair, plaintiff was caused to, "tip over forward onto the ground with said wheelchair landing directly on top of her striking her body against the ground". In Count 1 of the complaint, plaintiffs claim that:

> Defendant breached the duty of care owed to plaintiff in the manufacture of the power wheelchair by, inter alia:
>
> a. failing to make or cause to be made reasonable inspections to discover, diagnose and correct defects in the wheelchair, all of which were known to defendant, or which in the exercise of due care should have been known;
>
> b. failing to provide adequate safety precautions for the protection of persons in a situation similar to that of plaintiff, including, but not limited to, the failure to provide appropriate and adequate anti-tip wheels used in the power wheelchair and by failing to provide an appropriate safety device on said chair, which could have been provided at a cost much less than the risk presented to plaintiffs and others;
>
> c. failing to provide adequate warnings to plaintiff of [*5] the dangers present in, and present by, use of the wheelchair and its various components such as its anti-tip wheels;
>
> d. failing to provide cautionary instructions and warnings to plaintiff regarding the appropriate uses and limitations of said power wheelchair.
>
> The acts and omissions complained of were a direct and proximate cause of plaintiff's injuries.
>
> The acts and omissions complained of were reasonably foreseeable by defendant as the manufacturer and designer of said power wheelchair.

In Count 2, plaintiffs allege, inter alia:

> Sometime prior to June 18, 2004, defendant designed and manufactured the power wheelchair, model name "Teknique" and placed it into the stream of commerce.
>
> The wheelchair was sold in a defective condition which made it unreasonably dangerous to persons such as plaintiff, who would reasonably have been expected by defendant to be injured by the wheelchair.

In Count 3, plaintiffs allege:

> Upon information and belief, the power wheelchair delivered and supplied by defendant to the plaintiffs was unfit and non-merchantable.
>
> Upon information and belief, the condition of the "Teknique" power wheelchair was wholly due to the fault of defendant and without fault or neglect [*6] on the part of the plaintiffs, and was not properly fit for the ordinary purposes for which power wheelchairs are used and was of non-merchantable quality.

Defendant construes plaintiffs four causes of action as grounded in: 1) negligence; 2) strict liability; 3) breach of warranty; and 4) loss of consortium. [3] Defendant moves for summary judgment on the first three causes of action. [4] (Dkt. No. 36).

3 Plaintiffs do not dispute defendant's characterization of the causes of action. The Court notes that at the time the complaint was filed, plaintiffs were represented by counsel. On November 6, 2007, Magistrate Judge Lowe entered an Order granting plaintiffs' counsel leave to withdraw.

4 Defendant does not move on the fourth cause of action as the parties agreed to hold the damages aspect of the case in abeyance pending the resolution of the liability phase.

IV. DISCUSSION

A. Requirements of Local Rule 7.1(a)(3)

The submissions of *pro se* litigants are to be liberally construed. *Nealy v. U.S. Surgical Corp.*, 587 F.Supp.2d 579, 583 (S.D.N.Y. 2008). However, a *pro se* litigant is not relieved of the duty to meet the requirements necessary to defeat a motion for summary judgment. *Id.* (citing *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003)).

Local Rule 7.1(a)(3) [*7] states:

> Summary Judgment Motions
>
> Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.
>
> The moving party shall also advise pro se litigants about the consequences of their failure to respond to a motion for summary judgment. See also L.R. 56.2.
>
> The opposing party shall file a response to the Statement of Material Facts. The non-movant's response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. [*8] The non-movant's response may also set forth any additional material facts that the non-movant contends are in dispute. Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

Local Rule 7.1(a)(3)(emphasis in original). Where a plaintiff has failed to respond to a defendant's statement of material facts, the facts as set forth in defendant's Rule 7.1 statement will be accepted as true to the extent that (1) those facts are supported by the evidence in the record, and (2) the non-moving party, if he is proceeding *pro se*, has been specifically advised of the potential consequences of failing to respond to the movant's motion for summary judgment. *Littman v. Senkowski*, 2008 U.S. Dist. LEXIS 10388, 2008 WL 420011, at *2 (N.D.N.Y. 2008) (citing *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996)).

In the case at hand, defendant properly filed a Statement of Undisputed Facts pursuant to Local Rule 7.1. Defendant also provided plaintiffs with a copy of the motion papers and a copy of a notice from this district entitled "NOTIFICATION OF THE CONSEQUENCES OF FAILING TO RESPOND TO A SUMMARY JUDGMENT MOTION". Plaintiffs do not dispute that they [*9] received such notification from defendant. Indeed, plaintiff Fred Hare submitted opposition to defendant's motion and stated:

> Defendant's Hoveround's Statement of Undisputed Facts are misleading and at best are in error. A restatement of all the items enumerated in the Defendant's pleading, the Plaintiff has no quarrel with.

However, plaintiffs failed to properly respond to defendant's Rule 7.1 statement. Therefore, defendant's statement will be accepted as true to the extent that the facts are supported by evidence in the record.

B. Standard Governing Motion for Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the Court, viewing the evidence in the light most favorable to the [*10] nonmovant, determines that the movant has satisfied this burden, the burden then shifts to the nonmovant to adduce evidence establishing the existence of a disputed issue of material fact requiring a trial. *See id.* If the nonmovant fails to carry this burden, summary judgment is appropriate. *See id.*

C. Strict Products Liability

A federal court sitting in a diversity case will apply the substantive law of the forum state on outcome determinative issues. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d. Cir. 1997). In New York, there are three distinct claims for strict products liability: (1) a manufacturing defect, which results when a mistake in manufacturing renders a product that is ordinarily safe dangerous so that it causes harm, *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); (2) a warning defect, which occurs when the inadequacy or failure to warn of a reasonably foreseeable risk accompanying a product causes harm, *Torrogrossa v. Towmotor Co.*, 44 N.Y.2d 709, 376 N.E.2d 920, 405 N.Y.S.2d 448 (1978); and (3) a design defect, which results when the product as designed is unreasonably dangerous for its intended use, *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983). *McCarthy*, 119 F.3d at 154-155. Of the [*11] three types of products liability theories recognized under New York law, defendant argues that plaintiffs' complaint asserts that the wheelchair suffered from design and manufacturing defects. [5]

5 Plaintiffs do not dispute this contention.

1. Manufacturing Defect

A manufacturing defect in a product is one which results from a mistake or error made during the manufacturing process. *Fitzpatrick v. Currie*, 52 A.D.3d 1089, 1090, 861 N.Y.S.2d 431 (3d Dep't 2008). To plead and prove a manufacturing flaw, plaintiffs must show that a specific product unit was defective as a result of "some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction," and that the defect was the cause of plaintiff's injury. *Horowitz v. Stryker Corp.*, 613 F.Supp.2d 271, 283 (E.D.N.Y. 2009). To establish a prima facie case, plaintiff may rely upon the circumstances of the accident and proof that the product did not perform as intended. *Brown v. Borruso*, 238 A.D.2d 884, 885, 660 N.Y.S.2d 780 (4th Dep't 1997).

A defendant moving for summary judgment must submit proof in admissible form establishing that a plaintiff's injuries were not caused by a manufacturing defect in the product. *McArdle v. Navistar Int'l Corp.*, 293 A.D.2d 931, 932, 742 N.Y.S.2d 146 (3d Dep't 2002) [*12] (holding that the defendant met the burden by submitting proof that the sweeper was built to State specifications and was thoroughly examined and approved by several DOT inspectors prior to shipment); *see also Preston v. Peter Luger Enters., Inc.*, 51 A.D.3d 1322, 1324, 858 N.Y.S.2d 828 (3d Dep't 2008) (in support of summary judgment, the defendant offered testimony from employees regarding the bottle inspection process). Summary judgment is not appropriate if the movant fails to provide any affidavit or cite to any deposition testimony that describes the manufacturing, safety devices or quality control process for the subject device. *Bueno v. Chase Manhattan Bank*, 23 Misc. 3d 1106[A], 885 N.Y.S.2d 710, 2009 NY Slip Op 50611[U], 2009 WL 960719, at *6 (N.Y. Sup. 2009); *cf. Arnold v. Krause, Inc.*, 232 F.R.D. 58, 71 (W.D.N.Y. 2004) (holding that summary judgment was appropriate as the defendant submitted the affidavit of an expert who opined that a ladder was not defective after the expert examined the subject ladder and recreated the conditions under which the plaintiff's accident took place). In this matter, defendant, as the movant, has the burden of establishing that the wheelchair was in proper working order when it arrived at plaintiffs' home. *See Wesp v. Carl Zeiss, Inc.*, 11 A.D.3d 965, 968, 783 N.Y.S.2d 439 (4th Dep't 2004).

With [*13] respect to defendant's motion for summary judgment and dismissal of the manufacturing defect claim, defendant argues, "[p]laintiffs provide no evidence of a defect in the [] manufacture of the Hoveround product". On the motion, defendant provided affidavits from Anthony Digiovanni, one of defendant's employees, and William Ammer, defendant's expert. Mr. Digiovanni has been employed by defendant for eight years and is the Engineering Director of the technical team that developed the subject wheelchair. In his capacity as Engineering Director, Mr. Digiovanni stated that he was involved, "in the manufacture of the subject wheelchair including review of quality control

evaluations and records from individual components used and overall final evaluation of completed power wheelchairs". On September 16, 2008, Mr. Digiovanni inspected the subject wheelchair and concluded that the wheelchair, "in all respects except for normal wear and tear, represented a Hoveround TEK FWD Power Wheelchair as designed and manufactured with Food and Drug Administration (FDA) approval". In further support of the motion, defendant provided an affidavit from their expert witness, William Ammer. Mr. Ammer is an [*14] engineer and prepared an affidavit after reviewing various documents and materials including test reports for the subject wheelchair from the University of Pittsburgh, the FDA 510K application from Hoveround, the 510K approval letter from the FDA and the Owner's Manual for the subject wheelchair. [6] Mr. Ammer opined that:

> the design of the subject chair, and its associated warnings and labeling, meet or exceed the requirements of the ANSI/RESNA and FDA for power wheel chairs and that the product, as designed, tested and manufactured, was and remains reasonably safe and fit for the purpose intended for such chairs". [7]

6 The FDA Premarket Notification or 510k process requires manufacturers to notify the FDA of their intent to market a medical device.

7 ANSI/RESNA is American National Standards Institute/Rehabilitation Engineering and Assistive Technology Society of North America.

Having reviewed the affidavits together with the record, the Court finds that defendant has failed to meet the burden of proof necessary to warrant summary judgment and dismissal of this claim. Defendant has not addressed the facts as they pertain to the manufacturing defect claim and defendant's arguments lack any [*15] meaningful analysis of the record or the applicable caselaw. Defendant has not offered any evidence concerning the manufacturing process for the Teknique wheelchair. Mr. Digiovanni claimed to be directly involved with the manufacture of the wheelchairs however, Mr. Digiovanni's affidavit lacks any information with regard to Hoveround's manufacturing process or any inspection/testing methods that the Teknique wheelchair underwent prior to shipment. Mr. Ammer's affidavit is similarly deficient as it is devoid of any information describing the manufacturing, inspection or testing process for the subject wheelchair.

Furthermore, defendant has failed to provide affirmative proof that the subject wheelchair was free of any defects when it arrived at plaintiff's home. Although Mr. Digiovanni inspected the subject wheelchair and concluded that it was free of manufacturing defects, Mr. Digiovanni's inspection occurred more than four years after the subject accident. *See generally* *Schriber v. Melroe Co.*, 273 A.D.2d 650, 710 N.Y.S.2d 416, (3d Dep't 2000) (holding that the lower court properly excluded an expert's opinion based upon an inspection of a machine four years after the incident). Mr. Ammer claims that [*16] he is "familiar with the chair" however, Mr. Ammer did not inspect the subject wheelchair. Moreover, Fred Hare testified that the day after plaintiffs received the wheelchair, he complained to Joanne Brown because the wheelchair tipped off of a ramp. Defendant has failed to establish that the subject wheelchair was free of defects when it left defendants control. Thus, defendant has failed to sustain the burden of proof on a motion for summary judgment.

Moreover, defendant did not address plaintiff's accident and failed to argue that plaintiff's accident was caused by something other than a manufacturing defect in the product. *Vereczkey v. Sheik*, 57 A.D.3d 523, 526, 869 N.Y.S.2d 146 (2d Dep't 2008) (the defendants failed to establish their entitlement to judgment as a matter of law as they did not establish that the product was not defective and that the accident was caused by something other than a manufacturing defect) (citing *Speller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38, 42, 790 N.E.2d 252, 760 N.Y.S.2d 79 (2003)). As the Court previously stated, there is no evidence concerning how or where plaintiff's accident took place. In support of the motion, defendant provided only 4 of the 134 pages of Fred Hare's deposition transcript, [*17] none of which discuss the accident. Further, the record establishes that the parties conducted the deposition of Dr. Bernard Boozer, an alleged witness to the accident. However, Dr. Boozer's deposition transcript is not part of the record herein. Finally, although plaintiffs claim that Joanne Brown witnessed the accident or possesses some pertinent information, defendant failed to address that contention and the record contains no information concerning Ms. Brown.

The Court finds that defendant has failed to prove that no triable issues of fact exist with respect to plaintiffs' claim of a manufacturing defect. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Restrepo v. Rockland Corp.*, 38 A.D.3d 742, 743, 832 N.Y.S.2d 272 (2d Dep't 2007) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986)). The defendant has not presented affirmative proof that the subject chair was

free of any defect when it left defendant's control and defendant has not established that a manufacturing defect in the wheelchair did not cause the accident. Defendant relies solely upon the absence of any proof presented by plaintiff, which is insufficient [*18] to support a motion for summary judgment. *See* *Antonucci v. Emeco Indus., Inc.*, 223 A.D.2d 913, 915, 636 N.Y.S.2d 495 (3d Dep't 1996). As defendant has not met the burden of proof on the issue, the burden never shifts to plaintiffs to come forward with admissible evidence. Accordingly, defendant's motion for summary judgment and dismissal of plaintiffs' claims of a manufacturing defect is denied.

2. Design Defect

In order to establish a *prima facie* case in strict products liability for a design defect, a plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury. *Voss*, 59 N.Y.2d at 107. The proper standard is whether it is a product which, if the design defect were known at the time of the manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner. *Id.* at 108. Liability attaches when the product, as designed, presents an unreasonable risk of harm to the user. *Preston*, 51 A.D.3d at 1323 (the defendant met its burden on summary [*19] judgment with the submission of affidavits from its president and manager that the bottle exceeded industry standards and further, that the plaintiff's accident was the only incident where the bottle broke) (citing *Voss*, 59 N.Y.2d at 107). It is the plaintiff's burden to present "evidence that the product, as designed, presented a substantial likelihood of harm and feasibly could have been designed more safely." *Arnold*, 232 F.R.D. at 72. In that regard, the plaintiff may initially rely on circumstantial evidence, including the occurrence of an accident, that the product did not function as intended, to prove a design defect. *Id.* (citing *Dubecky v. S2 Yachts, Inc.*, 234 A.D.2d 501, 651 N.Y.S.2d 602 (2d Dep't 1996)). In this matter, plaintiffs may rely upon the fact that the wheelchair tipped over to establish that the chair failed to function as intended based on a design defect thus shifting the burden to defendant, as the party moving for summary judgment, to present evidence that the accident was not necessarily attributable to any defect in the wheelchair. *See* *Arnold*, 232 F.R.D. at 72.

Upon a review of the record, the Court finds that defendant met the burden of establishing a prima facie entitlement [*20] to summary judgment on the design defect claim. Mr. Ammer averred that he has been designing and testing wheelchairs since 1999. Mr. Ammer stated that the subject wheelchair was granted a 510K approval by the FDA in 2001. Mr. Ammer opined that the design of the wheelchair met or exceeded the requirements of the FDA and ANSI/RESNA for power wheelchairs and that the design was reasonably safe and fit for the purpose intended. In addition, Mr. Digiovanni provided information concerning the 510K process and stated that upon receipt of clearance number K010075 from the FDA, the device was "suitable for marketing and sale in the US and with no new issues of safety and effectiveness". Mr. Digiovanni also stated that in his capacity as Engineering Director, he monitored the performance of the subject wheelchair. Mr. Digiovanni stated that Hoveround maintained a Medical Device Log for the subject wheelchair and upon an examination of that information, he found no reports of incidents similar to plaintiffs. Magistrate Judge Lowe conducted an *in camera* review of the logs and found that, "the prior incidents were not sufficiently similar to Mrs. Hare's". Based upon the record, the Court finds [*21] that defendant met the initial burden of establishing entitlement to summary judgment with respect to the design defect claim. Therefore, the burden shifts to plaintiffs to demonstrate by admissible evidence, that an issue of fact exists requiring a trial of the issue. The Court finds that plaintiffs failed to sustain that burden.

In opposition to the motion, plaintiffs offered a report from Gary P. Finn. [8] Mr. Finn is affiliated with Monroe Wheelchair and claims an expertise in matters involving power wheelchairs. In his letter, Mr. Finn stated that:

> I received correspondence from Fred and Ethel requesting a consult as to the design of the Hoveround Teknique FWD. I informed the family that I was not a design engineer and could not complete the requested task, but offered an evaluation as to the application of the product and it's suitability for Mrs. Hare.

8 The Court notes that Mr. Finn's report consists of a one page letter that is not in proper evidentiary form.

Defendant objects to the submission of Mr. Finn's report. [9] However, even assuming that the Court accepts plaintiffs' expert report, Mr. Finn's opinion is insufficient to raise a triable issue of fact with respect to a design [*22] defect. Mr. Finn specifically declined to offer any opinion with regard to the design of the wheelchair and failed to address any of the factors which plaintiffs must

prove in order to establish that the wheelchair was not reasonably safe. *See June v. Lift-A-Loft Equipment, Inc.*, 1992 U.S. Dist. LEXIS 10064, 1992 WL 168181, at *3 (N.D.N.Y. 1992).

> 9 Defendant argued that plaintiffs time for expert disclosure passed and defendant did not consent to plaintiffs presentation of an expert beyond the time for disclosure. However, the Court has not been presented with a motion to preclude plaintiffs' expert submission.

Plaintiffs remaining submission consists only of a one-page signed statement from Mr. Hare which is not in admissible form. Plaintiffs allege that the chair was "unsuited" for Ethel Hare however, the fact that a product does not operate properly does not by itself mean that the product was defectively designed. *See June*, 1992 U.S. Dist. LEXIS 10064, 1992 WL 168181, at *3. Plaintiffs fail to offer any other proof to create a question of fact as to whether or not the wheelchair was not reasonably safe as designed. Accordingly, based upon the record, defendant is entitled to summary judgment and dismissal of plaintiffs' claims of strict [*23] products liability for design defect.

D. Breach of Implied Warranties

In Count 3 of the complaint, plaintiffs argue that the wheelchair was unfit and non-merchantable. Defendant argues that plaintiffs failed to raise an issue of fact as to whether there was a breach of an implied warranty. [10] Specifically, defendant argues that plaintiffs' breach of implied warranty claims should be dismissed as defendant expressly disclaimed any implied warranties in the Owner's Manual.

> 10 Plaintiffs did not respond to defendant's arguments with respect to implied warranties.

Implied warranties of merchantability and fitness for a particular purpose are governed by Uniform Commercial Code (UCC) §§ 2-314 and 2-315. Under UCC § 2-314, a plaintiff need only show that the product was not "fit for the ordinary purposes for which such goods are used". *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 258, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995). Under UCC § 2-315, a warranty of fitness is implied in every case in which the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. *McCarthy v. Checchin*, 18 Misc. 3d 1134[A], 859 N.Y.S.2d 896, 2004 NY Slip Op 51918[U] (N.Y. Sup. 2004). Where a limited warranty expressly excludes any common-law implied warranty, it is exclusive [*24] and a cause of action sounding in common-law breach of contract may not be maintained. *Lantzy v. Advantage Builders, Inc.*, 60 A.D.3d 1254, 1255, 876 N.Y.S.2d 184 (3d Dep't 2009). UCC § 2-316(2) provides, in pertinent part that, to exclude or limit an implied warranty of merchantability, "the language [of the exclusion or limitation] must mention merchantability and in case of a writing must be conspicuous." The test to determine whether a clause is "conspicuous" so as to satisfy UCC § 2-316 "is whether a reasonable person would notice the disclaimer when its type is juxtaposed against the rest of the agreement." *Commercial Credit Corp.v. CYC Realty, Inc.*, 102 A.D.2d 970, 972, 477 N.Y.S.2d 842 (3d Dep't, 1984); *see also Travelers Ins. Co. v. Howard E. Conrad, Inc.*, 233 A.D.2d 890, 891, 649 N.Y.S.2d 586 (4th Dep't 1996) (the type size of the waiver provision was larger and stood out in capital letters); *see also Sky Acres Aviation Servs., Inc. v. Styles Aviation, Inc.*, 210 A.D.2d 393, 620 N.Y.S.2d 442 (2d Dep't 1994) (holding that the invoice contained a pre-printed disclaimer in bold which was readily noticeable). The disclaimer must also specify the warranties that are being disclaimed. *See Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F.Supp. 286, 304 (S.D.N.Y. 1998).

In [*25] the case at hand, the last page of the Owner's Manual is entitled "Limited Warranty". The subject disclaimer is in capital letters and specifically identifies the implied warranties being disclaimed as those of merchantability and fitness for a particular purpose. The Court finds that a reasonable person would notice the disclaimer. Indeed, Fred Hare executed the Delivery Ticket and acknowledged that he received, read and understood the Owner's Manual and warranty information. Plaintiff has offered no argument or evidence in opposition to defendant's motion on this issue. Accordingly, based upon the record, defendant is entitled summary judgment and dismissal of plaintiffs' claims of breach of implied warranties. [11]

> 11 Defendant also alleges that plaintiffs' breach of warranty claims must fail as plaintiffs have failed to identify any defect in the product and further, that the Owner's Manual clearly sets forth the intended use for the product. However, defendant failed to provide evidence to support either assertion. Moreover, as plaintiffs' claims of breach of implied warranties are subject to dismissal due to the disclaimer, the Court finds defendant's remaining arguments in this [*26] regard to be moot.

E. Negligence

To make out a *prima facie* case for negligence in New York, plaintiff must show: (1) that the manufacturer owed him a duty to exercise reasonable care; (2) breach of that duty so that a product is rendered defective, i.e., reasonably certain to be dangerous; (3) that the defect

was the proximate cause of plaintiff's injury; and (4) loss or damage. *See, e.g., McCarthy*, 119 F.3d at 156. In the complaint, plaintiffs alleges that defendant failed to provide adequate safety precautions and adequate warnings. A plaintiff asserting a failure to warn must establish that: (1) a manufacturer has a duty to warn; (2) against dangers resulting from foreseeable uses about which it knew or should have known; and (3) that failure to do so was the proximate cause of the harm. *Burke v. Spartanics, Ltd.*, 252 F.3d 131, 139 (2d Cir. 2001). "Once a warning is given, the focus shifts to the adequacy of the warning . . . [New York] courts have required . . . that warnings must clearly alert the user to avoid certain unsafe uses of the product which would appear to be normal and reasonable." *Cooley v. Carter-Wallace Inc.*, 102 A.D.2d 642, 646, 478 N.Y.S.2d 375 (4th Dep't 1984) (citations omitted). [*27] The Second Circuit has emphasized, where a plaintiff alleges a failure to warn, "[t]he adequacy of the instruction or warning is generally a question of fact to be determined at trial and is not ordinarily susceptible to the drastic remedy of summary judgment." *Urena*, 114 F.3d at 366 (citing *Beyrle v. Finneron*, 199 A.D.2d 1022, 606 N.Y.S.2d 465 (4th Dep't 1993)). A court may dismiss a failure to warn claim as a matter of law if the plaintiff cannot prove that the absence of a warning caused her injury. *Mustafa v. Halkin Tool, Ltd.*, 2007 U.S. Dist. LEXIS 23096, 2007 WL 959704, at *17 (E.D.N.Y. 2007) (the defendant successfully argued that it was not liable because the plaintiff was fully aware of the danger and further, that the warnings were not the proximate cause of the accident); *see also Lichtenstein v. Fantastic Mdse. Corp.*, 46 A.D.3d 762, 764-765, 850 N.Y.S.2d 462 (2007) (holding that deposition testimony that additional or more conspicuous warnings would have alerted the plaintiff's mother to the potential for burns from the subject product raised an issue of fact as to whether the lack of adequate warnings was the proximate cause of the infant's injuries).

In this action, defendant's argument in support of summary judgment and dismissal of [*28] the negligence cause of action consists of one sentence, "defendant has demonstrated that its product that the design of the subject chair, and its associated warnings and labeling, satisfy the requirements of the ANSI/RESNA and FDA for power wheel chairs and that the product, as designed, tested and manufactured, was and remains reasonably safe and fit for the purpose intended for such chairs". Defendant provides no further argument or analysis in support of dismissal of the negligence claims.

Upon review of the record, the Court finds that defendant has failed to establish that defendant's warnings and safety precautions were adequate as a matter of law. Defendant's Statement of Undisputed Facts contains references to various paragraphs in the Owner's Manual that provide warnings/cautions with regard to the operation of the wheelchair. However, defendant does not provide any argument or evidence to prove that there is no triable issue of fact with regard to the adequacy of such warnings. The excerpts of plaintiffs' deposition transcripts do not contain any reference or testimony concerning the warnings including whether or not plaintiffs understood or even read the warnings. Based [*29] upon the record, defendant has not excluded all possibility that plaintiffs might prove their claim as a matter of law as "reasonable minds might disagree as to the extent of plaintiff's knowledge, " *Brady v. Dunlop Tire Corp.*, 275 A.D.2d 503, 505, 711 N.Y.S.2d 633 (3d Dep't 2000), and the question is therefore one for a jury. As defendant has failed to demonstrate a *prima facie* entitlement to judgment as a matter of law dismissing the negligence cause of action, the burden did not shift to plaintiffs to raise a triable issue of fact.. *See Winegrad*, 64 N.Y.2d at 853. Accordingly, defendant's motion for summary judgment and dismissal of plaintiffs' negligence cause of action is denied.

V. CONCLUSION

It is therefore

ORDERED that defendant's motion for summary judgment and dismissal of plaintiffs' claims of strict products liability based upon a manufacturing defect (Dkt. No. 36) is **DENIED**, and it is further

ORDERED that defendant's motion for summary judgment and dismissal of plaintiffs' claims of strict products liability based upon a design defect (Dkt. No. 36) is **GRANTED**, and it is further

ORDERED that defendant's motion for summary judgment and dismissal of plaintiffs' claims of breach of implied warranties [*30] (Dkt. No. 36) is **GRANTED**, and it is further

ORDERED that defendant's motion for summary judgment and dismissal of plaintiffs' claims of negligence (Dkt. No. 36) is **DENIED**; and it is further

ORDERED that the parties electronically file a joint status report as to estimated length of trial and any outstanding issues on or before October 1, 2009.

IT IS SO ORDERED.

Date: September 22, 2009

/s/ Norman A. Mordue

Norman A. Mordue

Chief United States District Court Judge

LEXSEE

Diane Healy [1] v. McGhan Medical Corporation et al. [2]

1 Mark Healy. This case has been consolidated with those of nine other plaintiffs: Cheryl Marks (Bristol #B98-00154); Eunice Berger (Essex # 97-2120); Christine Giordano (Middlesex # 98-512); Belle McDonald (Middlesex # 98-513); Virginia Usen (Norfolk # 97-2488); Beverly Ferris (Plymouth # 98-141B); Denise Joyal (Plymouth # 97-1523B); Debbie Higgins (Worcester # 97-2393); Karen Butler (Bristo, # 97-01627).

2 Nusil Technology, f/k/a McGhan Nusil Corporation; Minnesota Mining and Manufacturing Company; and Jim Barley.

CA 97-5320

SUPERIOR COURT OF MASSACHUSETTS, AT SUFFOLK

2000 Mass. Super. LEXIS 697

December 26, 2000, Decided
March 29, 2001, Filed

DISPOSITION: [*1] For the foregoing reasons, 3M's motion for summary judgment is ALLOWED.

JUDGES: Gordon L. Doerfer Justice of the Superior Court.

OPINION BY: Gordon L. Doerfer

OPINION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT 3M'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On October 30, 2000, this matter was before the court for hearing on the motion of defendant Minnesota Mining and Manufacturing Company ("3M") for summary judgment. Plaintiff Diane Healy ("Ms. Healy") originally brought this action against 3M and the other defendants to recover for injuries she allegedly suffered from the rupture of a silicone breast implant manufactured and sold by the McGhan Medical Corporation after 3M's 1984 divestiture of its breast implant business. On September 7, 2000, at oral argument on 3M's motion, this court requested that, for the purposes of the 3M summary judgment motion, the parties jointly move to consolidate Ms. Healy's action with those commenced by the remaining plaintiffs in this case. On September 8, 2000, the court allowed the parties' joint motion to consolidate the actions.

In her complaint, Ms. Healy alleges negligence, breach of warranty, deceit, fraudulent divestiture, and violation [*2] of G.L.c. 93A. In addition to Ms. Healy's claims, the additional plaintiffs raise claims of negligent misrepresentation and concealment, false advertising, *res ipsa loquitur,* and fear of future product failure. 3M argues that it is entitled to judgment as a matter of law on all counts because 3M did not manufacture or sell the breast implants in question. For the following reasons, the motion is ALLOWED.

BACKGROUND

The following facts are undisputed. In 1974, Donald McGhan ("McGhan"), an engineer for Dow Corning, formed McGhan Medical Corporation ("McGhan I") to manufacture and sell interocular lenses. In 1975, McGhan I also began selling breast implants. In 1977, when 3M decided to enter the breast implant business, it purchased McGhan I and proceeded to run it as a wholly-owned subsidiary named McGhan Medical Corporation ("McGhan II"), a Delaware corporation. McGhan II purchased all the assets and good will of McGhan I, and McGhan I was dissolved. On December 31, 1981, McGhan II was merged into 3M. After the merger, McGhan II was dissolved and the breast implant and lens businesses became McGhan Medical/3M, a department in 3M's Surgical Products Division. Between 1977 [*3]

and 1984, 3M was in the business of manufacturing and selling breast implants.

In 1984, after the breast implant business had generated several product liability claims and lawsuits, 3M decided to sell that portion of the business. At that time, 3M was aware that the FDA was considering reclassifying breast implants to "Class 3" status, which would have required expensive evaluation and testing, and might have increased the risk of punitive damages for a manufacturer with "deep pockets." 3M received three formal offers to purchase the breast implant business, including one from McGhan and a group of individual investors for five and a half million dollars. On August 3, 1984, 3M sold the breast implant business to McGhan and his investors, who formed a new California corporation ("McGhan III"). On that date, 3M ceased manufacturing and selling breast implants. McGhan III purchased the business for $ 5.5 million dollars, $ 2.75 million of which was funded by a promissory note to 3M at 12% interest, payable within three years of the closing. 3M also provided McGhan III with certain transition sterilization, computer, and manufacturing consulting services for some months following [*4] the sale and subleased to McGhan III the property at which the implants were manufactured.

Although 3M restructured and extended the $ 2.75 million loan in August 1985, McGhan III subsequently defaulted in April 1987. 3M stayed enforcement of the promissory note and again restructured the debt in April 1988. At that time, 3M received $ 1.45 million in cash and restructured the remaining $ 1 million in principal. In March 1990, 3M loaned McGhan III $ 300,000 to settle a breast implant lawsuit.

In 1985, McGhan III became a wholly-owned subsidiary of First American Corporation (later renamed INAMED), a publicly owned corporation.

On December 12 and December 18, 1989, plaintiff Healy underwent surgical procedures to receive breast implants that had been manufactured and sold by McGhan III. [3] Even though two plaintiffs have presented no identifying information for their implants, their implants were received several years after 3M had divested itself of the breast implant business. [4] Plaintiffs argue that even if the breast implants in question were not manufactured by 3M, 3M remains liable because 1) 3M was aware that there were safety problems concerning the product when [*5] they decided to sell their breast implant business; 2) 3M failed to inform women, physicians or the FDA about safety problems with the implants; 3) the sale to McGhan III was a fraudulent attempt to limit 3M's liability for problems with the implants; and 4) 3M retained involvement and a financial interest in the breast implant business following the sale to McGhan III.

3 Product ID lot numbers provided by the plaintiffs indicate that plaintiffs Denise Joyal, Virginia Usen, Debbie Higgins and Christine Giordano also received implants that were manufactured and sold by McGhan III. Of the five remaining plaintiffs, one received a saline implant, which 3M discontinued in 1979; two received tissue expanders, a product never manufactured by 3M; and two have produced no product identification information.

4 In similar circumstances, another court accepted as undisputed fact 3M's assertion that McGhan III, and not 3M, manufactured and sold the breast implants at issue. See *Almonte v. 3M* (No. 97-0613ML) (D.R.I. Sept. 25, 2000) (order granting defendant's motion for summary judgment).

[*6] *DISCUSSION*

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991). "A party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's claim." *Id.* at 714; *Dolloff v. School Committee of Methuen*, 9 Mass. App. Ct. 502, 505, 402 N.E.2d 1067 (1980). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Id.* at 17. The non-moving party may not simply rest on his pleadings. See *Correllas v. Viveiros*, 410 Mass. 314, 317, 572 N.E.2d 7 (1991). Thus, plaintiff must set forth specific facts showing that there is a genuine issue for trial; "bare assertions and conclusions . . . [*7] are not enough to withstand a well-pleaded motion for summary judgment." *Polaroid Corp. v. Rollins Environmental Services, Inc.*, 416 Mass. 684, 696, 624 N.E.2d 959 (1993).

Here, therefore, the question is whether 3M has demonstrated that the plaintiffs have no reasonable expectation of proving an essential element of their claims against 3M, and whether the plaintiffs' response has set forth specific facts showing that there are genuine issues for trial. The court has applied this standard to each of plaintiff's claims.

Negligence (Count I)

In Massachusetts, the elements of an action for negligence are: 1) defendant owed plaintiff a duty of care; 2) defendant breached that duty; and 3) defendant's breach caused plaintiff's injuries. See *Ulwick v. DeChristopher,* 411 Mass. 401, 408, 582 N.E.2d 954 (1991). The first question for this court, therefore, is whether 3M had a legal duty of care to plaintiffs who purchased breast implants that were neither manufactured nor sold by 3M.

The existence of a duty is typically a question of law for the court. See *Yakubowicz v. Paramount Pictures,* 404 Mass. 624, 629, 536 N.E.2d 1067 (1989). [*8] It is well established that "a manufacturer has a duty to design products so they are reasonably fit for the purposes for which they are intended." *Smith v. Ariens Co.,* 375 Mass. 620, 625, 377 N.E.2d 954 (1978). Under Massachusetts law, "a plaintiff who sues a particular manufacturer for product liability generally must be able to prove that the item which it is claimed caused the injury can be traced to that specific manufacturer." *Piscitello v. Hobart Corp.,* 799 F. Supp. 224 (D.Mass. 1992), quoting *Mathers v. Midland-Ross Corp.,* 403 Mass. 688, 691, 532 N.E.2d 46 (1989); see also *Garcia v. Kusan, Inc.,* 39 Mass. App. Ct. 322, 330, 655 N.E.2d 1290 (1995) (where plaintiff could not prove which corporate entity manufactured the product that caused his injury, defendants were entitled to summary judgment). Here, plaintiffs have presented no evidence that 3M manufactured or sold the allegedly defective implants.

Plaintiff argues, however, that even if 3M did not manufacture or sell these particular implants, 3M is liable under a theory of negligent design [5] because McGhan III manufactured and sold products that were [*9] identical in design to those manufactured and sold by 3M prior to the divestiture. This argument also must fail. For negligence claims, "the duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design." *Simmons v. Monarch Machine Tool Co.,* 413 Mass. 205, 211, 596 N.E.2d 318 (1992). Once 3M had sold its breast implant business to McGhan III, 3M was no longer in a position to exercise any control over the design of the product. See *Felger v. McGhan Medical Corporation et al,* 36 F. Supp. 2d 863 (D.Minn. 1998) (when 3M sold product line to McGhan III, 3M sold design as well, and no longer had any control over design). 3M has established, therefore, that plaintiffs will be unable to prove the existence of a duty, an essential element of their negligence claim.

5 Although plaintiffs' complaint does not include a claim for negligent design, this court addresses the issue because plaintiffs argue that their negligence claim includes a claim for negligent design.

[*10] Once defendants have established plaintiff's inability to prove an essential element of the claim, the burden shifts to the plaintiffs to establish the existence of a dispute as to material facts. See *Mathers v. Midland-Ross Corp.,* 403 Mass. 688, 691, 532 N.E.2d 46 (1989). Here, plaintiffs have offered no evidence to show, or even raise a factual question as to whether 3M manufactured or sold their allegedly defective breast implants. Absent such evidence, plaintiffs have failed, as a matter of law, to establish that 3M had a duty to plaintiffs. Accordingly, 3M is entitled to summary judgment on the negligence claim.

G.L.c. 93A

As plaintiffs note, negligence that causes personal injury may constitute a violation of G.L.c. 93A, the Massachusetts Consumer Protection statute. These plaintiffs, however, are unable to prove an essential element of their negligence claim. Moreover, G.L.c. 93A, § 2 prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Here, plaintiffs did not purchase products that were sold or manufactured by 3M, and have failed to establish any facts indicating the [*11] existence of any conduct or business between the plaintiffs and 3M. Accordingly, 3M is entitled to summary judgment on the G.L.c. 93A claim.

Res Ispa Loquitur

A claim for *res ipsa loquitur* requires a showing that "the instrumentality causing the damage was in the sole and exclusive control and management of the defendant." *Bristol Wholesale Grocery v. Municipal Lighting Plant,* 347 Mass. 668, 673, 200 N.E.2d 260 (1964). Here, where 3M did not manufacture or sell the breast implants that allegedly injured plaintiffs, those implants were never under 3M's control, and 3M is entitled to summary judgment on the claim for res ipsa loquitur.

Breach of Warranty (Count II)

A warranty that goods are merchantable is implied in every sale of goods. See G.L.c. 106, § 2-318. [6] Thus, a manufacturer, seller, lessor or distributor has a duty to any person who might reasonably have been expected to use or be affected by the goods. Here also, plaintiffs have failed to present any evidence that there is a factual dispute as to whether 3M manufactured, sold, leased or distributed plaintiffs' silicone implants. In the absence of such evidence, 3M has demonstrated [*12] that plaintiffs have no reasonable expectation of proving that 3M had a duty to plaintiffs, and 3M is entitled to summary judgment on the breach of warranty claims.

6 The statute provides, in relevant part, that "a manufacturer, seller, lessor or supplier of goods" may be liable for breach of warranty, express or implied, or for negligence, although the defendant did not purchase the goods from the defendant "if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods."

Failure to Warn

Similarly, a claim for failure to warn requires that the defendant owe a plaintiff a legal duty. See *MacDonald v. Ortho Pharmaceutical Corporation*, 394 Mass. 131, 135, 475 N.E.2d 65 (1985). Where plaintiffs have failed to present any evidence that there is a genuine issue of material fact as to whether 3M owed plaintiffs a duty, 3M is also entitled to summary judgment on the failure to warn claim.

[*13] *3M Control of McGhan III*

In response to 3M's assertion that plaintiffs will be unable to prove that 3M owed them a legal duty, plaintiffs argue that McGhan III was so controlled by 3M that any breach of duty by McGhan III must also apply to 3M. Plaintiffs have not, however, presented any facts to support their claim that 3M controlled McGhan III. 3M and McGhan III, which were established and operated as independent corporations, conducted separate businesses after the date of the divestiture, with separate officers and directors. See *Atchison Casting Corp. v. Dofasco, Inc.*, 889 F. Supp. 1445 (D.Kan. 1995). See also *McConkey v. McGhan Medical Corporation et al*, 144 F. Supp. 2d 958, 2000 U.S. Dist. LEXIS 19895 (E.D.Tenn. 2000) ("the separate legal identities of [3M and McGhan III] fatally wounds Plaintiffs' attempt to transfer to 3M's doorstep McGhan III's duty to its customers").

Deceit (Count III)

Plaintiffs argue that 3M's failure to advise consumers about the dangers of the silicone breast implants constituted deceit. In order to establish a claim for deceit, the plaintiff must prove 1) that the defendant made a false statement of a material fact 2) with knowledge [*14] of its falsity, 3) for the purpose of inducing the plaintiff to act, and 4) that the plaintiff relied upon the false representation to his detriment. See *Macoviak v. Chase Home Mortgage Corp.*, 40 Mass. App. Ct. 755, 760, 667 N.E.2d 900 (1996). In order to bring such a claim, therefore, plaintiffs must show that 3M made factual misrepresentations to them regarding the McGhan III breast implants. A claim for deceit cannot stand where, as here, the plaintiff cannot demonstrate that she relied on any representation by the defendant. *Id.* Accordingly, 3M is entitled to summary judgment on the claim of deceit.

Fraudulent Divestiture, Fraudulent Financing, Fraudulent Concealment and Conspiracy (Count IV)

a. *Fraudulent Divestiture and Fraudulent Financing*

In essence, plaintiffs allege that 3M's sale of its breast implant business to McGhan III was a fraudulent attempt by 3M to escape liability for defective products by transferring the business to McGhan III, a company that did not have "deep pockets." Plaintiff further alleges that 3M and McGhan conspired to market a dangerous product to women without alerting consumers, physicians or the FDA to the [*15] dangers of the product. In support of this theory, the plaintiff points to the facts that 3M loaned McGhan III a significant part of the purchase price, then renegotiated the terms of the loan when McGhan III was unable to meet the payments.

Plaintiff alleges that "the laws of Massachusetts . . . do not allow a company to transfer a defective product line to a newly created second entity in order to enable the first to continue to profit from the sale of that defective product line, while sheltering liability for the injuries when the product falters." Plaintiffs have presented, however, neither factual evidence nor case law to support their claims that 3M"s transfer of the breast implant business to McGhan III constituted an attempt to defraud the public.

To support their claim that the divestiture was fraudulent, plaintiffs contend that 3M continued to profit from the breast implant business after the divestiture because 3M received 12% interest on its loan to McGhan III. In general, lenders are not liable for the torts of their borrowers. See *F.C. Imports v. First Nat. Bank*, 816 F. Supp. 78 (D. Puerto Rico 1993). Here, plaintiffs have presented the court [*16] with no facts to indicate that 3M had any role in McGhan III's business other than lending McGhan III money. See *Patriot General Life Ins. Co. v. CFC Investment Co.*, 11 Mass. App. Ct. 857, 861, 420 N.E.2d 918 (1981).

Similarly, there is no evidence of a joint venture between 3M and McGhan III. *Id.* at 860. Plaintiffs have presented no facts to indicate that the companies had any shared profits, any joint interest in particular assets, any joint control of performance or any pooling of assets. *Id.* Consequently, the mere fact that 3M lent McGhan III part of the purchase price does not make 3M liable for injuries that may have resulted from products manufactured and sold by McGhan III after the divestiture. [7]

7 The contract between 3M and McGhan III specified that McGhan III would assume liability for products manufactured by 3M on a "claims made" basis after the divestiture. That fact is irrelevant here, where there is no evidence that 3M manufactured or sold the breast implants that allegedly injured plaintiffs.

[*17] Plaintiffs argue further that 3M is liable for any problems caused by McGhan III's breast implants because 3M twice restructured the loan when McGhan III was unable to meet the payment schedule. Under the "Instrumentality" Doctrine, a corporation may be held liable for the debts of another corporation where it treats the subservient corporation "as a mere business conduit for the purposes of the dominant corporation." *F.C. Imports v. First Nat. Bank, supra*, 816 F. Supp. at 91. In order to establish liability, "the dominant corporation must have controlled the subservient corporation . . . and the dominant corporation must have proximately caused plaintiffs' harm through the misuse of its control." *Id.* There must be a strong showing "that the creditor assumed actual, participatory, total control of the debtor." 816 F. Supp. at 92. Here, although plaintiffs allege that 3M retained improper control over McGhan after the divestiture, they have offered no facts in support of that allegation other than the existence of the debtor-creditor relationship. By itself, however, the debtor-creditor relationship is not enough to constitute the control required for [*18] liability under the instrumentality doctrine. *Id.* Similarly, evidence that 3M restructured the loan does not indicate that 3M had any financial interest in McGhan III other than repayment of the promissory note. As a large creditor, 3M was naturally interested in the prosperity of McGhan III. Plaintiffs have presented no evidence that 3M's financial dealings with McGhan III demonstrated "the control that is necessary to become liable for the debtor's liabilities." *Id.*

As part of their theory of fraudulent divestiture, plaintiffs allege that, as the predecessor corporation, 3M remains liable for McGhan III's products. Under certain limited circumstances, the liabilities of a predecessor corporation may be imposed on a successor corporation that purchases its assets. See *Guzman v. MRM/Elgin et al,* 409 Mass. 563, 567, 567 N.E.2d 929 (1991). In this case, however, 3M is the predecessor corporation, not the successor. Plaintiffs have not cited any case law to support their proposition that a predecessor corporation should be held liable for the acts of its successor. See *Atchison Casting Corp. v. Dofasco, Inc.,* 889 F. Supp. 1445 (D.Kan. 1995) [*19] [8] ("Absent any citation to proper authority, the court will not turn theories of successor liability on their head to save plaintiff's claim").

8 When one company purchases the assets of another, the purchaser is not responsible for the debts and liabilities of the seller unless 1) the purchaser agrees to assume such liability, 2) the transaction is entered into fraudulently to avoid liability, 3) the transaction amounts to a de facto merger or 4) "the purchasing corporation is a mere continuation of the selling corporation." See *McCarthy v. Litton Industries, Inc.,* 410 Mass. 15, 21, 570 N.E.2d 1008 (1991).

Plaintiffs have presented no facts to support their claim that McGhan III was a sham corporation set up for the sole purpose of enabling 3M to avoid liability for allegedly defective breast implants. Accordingly, 3M is entitled to summary judgment on the claims for fraudulent divestiture and fraudulent financing. See *Felker v. 3M, supra*, 36 F. Supp. 2d 863, 877.

Fraudulent [*20] Concealment

In order to prove fraudulent concealment, a plaintiff must demonstrate a special relationship with the defendant that created a duty on the part of the defendant to disclose information. See *Urman v. S. Boston Savings Bank,* 424 Mass. 165, 168, 674 N.E.2d 1078 (1997) (no duty for bank to disclose knowledge that foreclosed condominium unit might be in an area subject to toxic waste contamination where bank had no fiduciary relationship with plaintiff purchasers). Here, where plaintiffs have presented no evidence of any relationship with 3M, plaintiffs have failed to establish a dispute of material fact as to whether 3M had a duty to disclose information about breast implants it had neither manufactured nor sold. Accordingly, 3M is entitled to summary judgment on the claim of fraudulent concealment.

Civil Conspiracy

Where, as here, there is no evidence of coercion, a claim of civil conspiracy requires "concerted action, whereby liability is imposed on one individual for the tort of another." *Kurker v. Hill,* 44 Mass. App. Ct. 184, 189, 689 N.E.2d 833 (1998). Thus "a person may be liable in tort if he knows that the conduct [*21] [of another person] constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Id.*, quoting Restatement (Second) of Torts § 876(b) (1977). Therefore, a claim of civil conspiracy requires "facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Kurker,* 44 Mass. App. Ct. at 189.

In this case, plaintiffs have presented no facts that demonstrate the existence of either a common plan or a tortious act. Plaintiffs offer several documents indicating that 3M was aware of complaints about silicone breast implants prior to the divestiture. Plaintiff has not, however, offered any facts indicating that McGhan III engaged in tortious acts following the divestiture or that 3M aided and abetted McGhan III in any tortious wrongdoing. To support its conspiracy theory, plaintiff alleges only that 3M provided McGhan with short-term sterilization, managerial, and computer services and that 3M had "a financial interest in assuring McGhan's ability to continue manufacturing and selling implants" [*22] because 3M had loaned McGhan III part of the purchase price. There is no evidence, however, that any of these activities were tortious.

Similarly, plaintiffs allege that "3M knowingly transferred a product line; the sale of those products was known to be tortious; and 3M actively assisted in the continuing sale of that product." As noted above, "bare assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." *Polaroid Corp. v. Rollins Environmental Services, Inc.*, 416 Mass. 684, 696, 624 N.E.2d 959 (1993). Here, where plaintiffs have offered only their own speculative theories about the allegedly tortious nature of the business arrangement between 3M and McGhan III, and have not supported those theories with facts, 3M is entitled to summary judgment on the civil conspiracy claim.

Concert of Action; Aiding and Abetting

For a claim of concert of action, a plaintiff must show "1) that the defendant and the other have an agreement to perform the act or achieve the particular result, and the agreement could be inferred from conduct of the parties suggesting that they had a meeting of the minds and 2) the defendant's [*23] own conduct must be tortious even though his conduct does not have to cause or be a substantial factor in causing the plaintiff's injury." See *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1033 (D.Mass. 1981). In this case, plaintiffs have presented no evidence of a factual dispute as to either tortious activity by 3M or McGhan III or an improper agreement between 3M and McGhan III. Where plaintiffs will be unable to prove an essential element of their claim, and have presented no evidence of a material factual dispute, defendant is entitled to summary judgment on the claim of concert of action.

Aiding and abetting adds the question of intent to a claim for concert of action where a plaintiff can show that a defendant has given substantial assistance to the other party. See *Payton*, 512 F. Supp. at 1035. Where plaintiffs will be unable to prove an essential element of their claim for concert of action, defendants are also entitled to summary judgment on the claim of aiding and abetting.

Fear of Future Product Failure

Massachusetts does not recognize a cause of action for fear of product failure. Moreover, 3M has established that it did [*24] not manufacture or sell the breast implants that allegedly caused plaintiffs' fear. Consequently, 3M is entitled to summary judgment on fear of future product failure. See *Felker*, 36 F. Supp. 2d at 876.

CONCLUSION [9]

9 By a letter dated December 14, 2000 (cc: to Tina Traficanti, Esq.) the plaintiffs submitted (but did not file with the clerk or obtain leave to do so) "a supplement to plaintiff's opposition." Although this submission was untimely the court has reviewed it. Nothing therein changes the conclusions of the court, even if it were to be properly considered by the court.

Defendants have demonstrated that they did not manufacture or sell the breast implants that allegedly injured these plaintiffs, and plaintiffs have failed to show that there are any disputed issues of fact as to whether 3M owed them a legal duty. Similarly, plaintiffs have failed to present any factual evidence to support their allegations that 3M's sale of its breast implant business to McGhan III was a sham [*25] sale designed to shield 3M from liability. Consequently, 3M is entitled to summary judgment on all of plaintiff's claims for which a legal duty is an essential element of the claim and on all claims alleging that the sale of 3M's breast implant business to McGhan III was fraudulent.

ORDER

For the foregoing reasons, 3M's motion for summary judgment is ALLOWED.

Gordon L. Doerfer

Justice of the Superior Court

December 26, 2000

LEXSEE

Kenneth J. Hemming et al., and All Others Similarly Situated, Respondents-Appellants, v. Certainteed Corporation et al., Appellants-Respondents, et al., Defendant

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Fourth Department

97 A.D.2d 976; 468 N.Y.S.2d 789; 1983 N.Y. App. Div. LEXIS 20817

November 4, 1983

PRIOR HISTORY: [**1] Appeals from order of Supreme Court, Monroe County, Smith, J. -- dismiss complaint.

JUDGES: Hancock, Jr., J. P., Callahan, Denman, Boomer and Moule, JJ.

OPINION

Order unanimously modified and, as modified, affirmed, without costs, in accordance with the following [*790] memorandum: These appeals are from two companion class actions brought by plaintiffs seeking money damages for harm allegedly caused to their homes by defective siding systems manufactured by defendants. Certain of the defendants appeal the denial of their motions to dismiss the complaint for failure to state a cause of action for strict liability, negligence and breach of express warranty. Plaintiffs, in both actions, cross-appeal the same orders insofar as they granted dismissal of the causes of action for class and individual relief for deceptive business acts and false advertising (General Business Law, §§ 349, 350) and from those parts of the orders dismissing their claims for the costs of re-siding their homes. Special Term held that a claim was stated in both negligence and strict liability for property damage caused to the homes but not to the siding system itself except to the extent the replacement of [**2] siding was necessary to repair damage to other parts of the homes. Special Term erred in reaching this conclusion. In *Schiavone Constr. Co. v Mayo Corp.* (56 NY2d 667, revg 81 AD2d 221 on dissenting opn below), the Court of Appeals adopted limitations on tort recovery based on product failure. The court held that, when damage suffered by a plaintiff is the result of a nonaccidental cause, such as deterioration or breakdown of the product itself, the injury is properly characterized as "economic loss" and plaintiff is relegated to contractual remedies. This decision reflects the principle that defects related to the quality of the product, e.g., product performance, go to the expectancy of the parties (loss of bargain) and are not recoverable in tort (see, also, *Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5; *Hole v General Motors Corp.*, 83 AD2d 715; *Dudley Constr. v Drott Mfg. Co.*, 66 AD2d 368). Moreover, the "economic loss" rule applies equally to negligence and strict liability causes of action and includes the direct and consequential damages which may result from product nonperformance (*Cayuga Harvester v Allis-Chalmers Corp., supra*). In short, these [**3] decisions relegate "economic loss" claims to the law of contracts and warranty which governs the economic relations between suppliers and consumers of goods. (Accord *Queensbury Union Free School Dist. v Walter Corp.*, 94 AD2d 834; *Jones & Laughlin Steel Corp. v Johns-Manville Sales Corp.*, 626 F2d 280, 289-290; see, also, *Moorman Mfg. Co. v National Tank Co.*, 91 Ill 2d 69; *Seely v White Motor Co.*, 63 Cal 2d 9). The essence of plaintiffs' claims is that the shingles, sheathing and nails ("siding systems") did not perform properly to protect their homes and, as a consequence, they have suffered direct loss to the siding itself and consequential damages to their homes. Their negligence and strict liability claims are properly characterized as being for "economic loss" due to product failure. Accordingly, Special Term erred in failing to dismiss those causes of action (CPLR 3211, subd [a], par 7).

LEXSEE

MICHAEL HICKMAN, an individual, on his own behalf and on behalf of all others similarly situated, Plaintiff, v. WELLS FARGO BANK N.A., Defendant.

No. 09-cv-5090

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2010 U.S. Dist. LEXIS 6125

January 26, 2010, Decided
January 26, 2010, Filed

COUNSEL: [*1] For Michael Hickman, an individual, on his own behalf and on behalf of all others similarly situated, Plaintiff: Jay Edelson, LEAD ATTORNEY, Evan M Meyers, KamberEdelson LLC, Chicago, IL; Irina Slavina, Steven L Lezell, Edelson McGuire, LLC, Chicago, IL.

For Wells Fargo Bank N.A., Defendant: John F. Kloecker, Sally Weiss Mimms, Simon A. Fleischmann, Thomas Justin Cunningham, LEAD ATTORNEYS, Julia C. Webb, Locke Lord Bissell & Liddell LLP, Chicago, IL; Robert T. Mowrey, LEAD ATTORNEY, Locke Lord Bissell & Liddell LLP, Dallas, TX.

JUDGES: Honorable AMY J. ST. EVE, United States District Court Judge.

OPINION BY: AMY J. ST. EVE

OPINION

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Before the Court is Defendant Wells Fargo Bank, N.A.'s ("Defendant") Motion to Dismiss ("Motion"). For the following reasons, the Court grants in part and denies in part Defendant's Motion.

BACKGROUND

Plaintiff Michael Hickman ("Plaintiff") brings this class action on behalf of himself and all others similarly situated alleging that Defendant, a national banking association, illegally reduced credit limits on home equity lines of credit ("HELOCs") in violation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), [*2] Regulation Z of the Truth in Lending Act, 12 C.F.R. § 226.5b ("Regulation Z"), and various state laws. For the purposes of this Motion, the Court assumes the following allegations are true.

Plaintiff obtained a $ 75,000 HELOC secured by real property located at 313 S. Hudson Street, Westmont, Illinois from Defendant on May 10, 2006. (R. 1, Complaint, P 14; R. 1-2, Equity Line with FlexAbility Agreement and Disclosure Statement (the "Contract"), p. 1.) The terms of Plaintiff's HELOC are governed by the Contract. Section 18 of the Contract provides that Defendant may "close [the] Account to future advances . . . [if] the value of the Property declines significantly below its original appraised value." (R. 1-2, Contract, § 18.) In addition, the Contract provides that, in the event of a closure or suspension of the account, Plaintiff "will continue to be responsible for full payment of the balance of [his] Account as well as all other account obligations, according to the terms of this Agreement." *Id.* Section 9 provides that each year the Contract is in effect, "a $ 75 non-refundable Annual Fee will be charged to [Plaintiff's] account." *Id.* at § 9.

On October 14, 2008, Defendant sent Plaintiff [*3] a letter indicating that Defendant was lowering the credit limit on Plaintiff's account to $ 31,039.83. (R. 1-1, October 14, 2008 letter from Defendant to Plaintiff ("October 14, 2008 Letter"), p. 1.) In the October 14, 2008 Letter, Defendant informed Plaintiff that "we are lowering the credit limit of your Account to $ 31,039.83 *due to a substantial decline in the value of the property securing the Account." Id.* (emphasis in original). The October 14, 2008 Letter did not provide Plaintiff with the value of the property as determined by Defendant or the method by which Defendant determined the value of the property. *Id.*

After receiving the October 14, 2008 Letter, Plaintiff contacted Defendant and requested the basis for Defendant's decision to reduce his HELOC. Defendant responded by letter dated October 20, 2008 and informed Plaintiff that Defendant valued Plaintiff's property using an automated valuation model ("AVM"). (R. 1-3, October 20, 2008 letter from Defendant to Plaintiff ("October 20, 2008 Letter"), p. 1.) Defendant further informed Plaintiff that, based on its valuation procedures, the value of the property as of May 1, 2008 was $ 531,000. *Id.*

Plaintiff alleges, on information [*4] and belief, that the value of the property securing his HELOC has not declined significantly in value. (R. 1, Complaint, P 30.) Plaintiff further alleges, on information and belief, that the AVM methodology employed by Defendant is inaccurate and unsubstantiated, making its use unfair, deceptive, and readily subject to manipulation. *Id.* at P 31. Plaintiff also alleges that even if his property did experience a decline in value, Defendant did not have any factual basis to conclude that a significant decline was still in effect at the time it reduced his HELOC on October 14, 2008. *Id.* at P 33.

Plaintiff alleges, on information and belief, that Defendant's lowering of his credit limit damaged his credit rating and increased the cost of credit to him. *Id.* at P 17. In addition, after reducing Plaintiff's line of credit, Defendant continued to charge Plaintiff a $ 75 annual fee. *Id.* at P 3. On January 26, 2009, Plaintiff received a notice indicating that Defendant increased the spending limit on his Wells Fargo credit card from $ 20,000 to $ 24,000.

LEGAL STANDARD

"A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). [*5] Pursuant to Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). As the Seventh Circuit recently explained, this "[r]ule reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)). This short and plain statement must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Under the federal notice pleading standards, a plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Put differently, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) [*6] (quoting *Twombly*, 550 U.S. at 570). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir. 2009) (court construes complaint in light most favorable to plaintiff drawing all reasonable inferences in plaintiff's favor).

ANALYSIS

I. Request for Judicial Notice

"Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Defendant requests that the Court take judicial notice of seven additional documents. "Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper." *Id.* *See also* Fed.R.Evid. 201. Plaintiff does not oppose Defendant's request for judicial notice and indeed relies on several documents presented by Defendant in its opposition to the Motion.

The Court therefore takes judicial notice of the following documents because they [*7] are matters of public record and because they are central to Plaintiff's claim: (i) Home Equity Line of Credit Mortgage by Plaintiff in Favor of Defendant, (R. 16-1, Wells Fargo's Request for Judicial Notice, Ex. 1); (ii) Purchase Money Mortgage by Plaintiff in favor of Defendant, *(id.* at Ex. 2); and (iii) Special Warranty Deed in Favor of Plaintiff, *(id.* at Ex. 3). The Court also takes judicial notice of the following administrative documents: (i) June 26, 2008 Federal Deposit Insurance Corporation ("FDIC") Financial Institution Letter, 2008 WL 2552743, *(id.* at Ex. 5); (ii) August 26, 2009 Memorandum issued by the United States Department of the Treasury entitled "Home Equity Line of Credit Account Management Guidelines" available on its official website, *(id.* at Ex. 6); and (iii) May 24, 2005 FDIC Financial Institution Letter, 2005 WL 1237869, *(id.* at Ex. 7). *Menominee Indian Tribe*, 161 F.3d at 456; *see also Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of information contained on the FDIC official website). The Court declines to take judicial notice of the "parcel search results" pertaining to 313 S. Hudson Street, [*8] Westmont, Illinois (R. 16-1, Request for Judicial Notice, Ex. 4) because Defendant has not established that it is part of the public record or necessary for resolution of its Motion.

II. Motion to Dismiss

Defendant requests the Court to dismiss Plaintiff's Complaint in its entirety for failure to state a claim pursuant to Rule 12(b)(6). For the following reasons, the Court grants in part and denies in part Defendant's Motion.

A. Violations of TILA and Regulation Z -- Counts II, IV, and VI

In Counts II, IV, and VI, Plaintiff alleges that Defendant's reduction of Plaintiff's HELOC violated TILA and Regulation Z. For the following reasons, the Court dismisses Counts IV and VI of Plaintiff's Complaint. The Court denies Defendant's Motion with respect to Count II.

1. Count II - Reduction of HELOC Limits

In Count II, Plaintiff claims that Defendant reduced his HELOC in violation of TILA and Regulation Z. Pursuant to TILA, a creditor may "[p]rohibit additional extensions of credit or reduce the credit limit applicable to an account under [an open end consumer credit] plan during any period in which the value of the consumer's principle dwelling which secures any outstanding balance is significantly [*9] less than the original appraisal value of the dwelling." 15 U.S.C. § 1647(c)(2)(B). Similarly, under Regulation Z, a creditor may not change any term of a HELOC agreement, except that, a creditor may "[p]rohibit additional extensions of credit or reduce the credit limit applicable to an agreement during any period in which [] [t]he value of the dwelling that secures the plan declines significantly below the dwelling's appraised value for purposes of the [home equity] plan." 12 C.F.R. § 226.5b(f)(3)(vi)(A). The official staff commentary to Regulation Z issued by the Federal Reserve Board (the "Official Commentary") further explains that "[w]hat constitutes a significant decline for purposes of § 226.5b(f)(3)(vi)(A) will vary according to individual circumstances. In any event, if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by fifty percent, this constitutes a significant decline in the value of the dwelling for purposes of § 226.5b(f)(3)(vi)(A)." Official Commentary, cmt. 5(b)(f)(3)(iv)-6. [1]

1 The Official Commentary to TILA and Regulation [*10] Z is controlling in this context. *See Hamm v. Ameriquest Mortg. Co.*, 506 F.3d 525, 528 (7th Cir. 2007) (the "Supreme Court has held that 'deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z [and]. . . [u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive'") (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980)).

In order to state a claim for violation of TILA and Regulation Z, Plaintiff must sufficiently allege that (i) Defendant reduced his HELOC (ii) during a period in which the value of his property did not decline to "significantly less than the original appraised value of the dwelling." 15 U.S.C. § 1647(c)(2)(B); 12 C.F.R. § 226.5b(f)(3)(vi)(A). Defendant does not dispute that Plaintiff has alleged that Defendant reduced his HELOC. Instead, Defendant argues that Plaintiff's conclusory statement that "on information and belief, neither Hickman's property nor the property of the Class members has significantly declined in value," (R. 1, Complaint, P 9), is insufficient to survive a 12(b)(6) motion to dismiss. [*11] Relying on *Iqbal,* Defendant reasons that Plaintiff's allegations are no more than conclusions.

Defendant's reading of federal pleading requirements, however, is too narrow. As the Seventh Circuit has explained, "courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim." *Brooks,* 578 F.3d at 581. Here, Plaintiff's Complaint provides Defendant with sufficient notice of Plaintiff's claim. Plaintiff specifically alleges that Defendant reduced his HELOC in contravention of TILA because his home did not experience a significant decline in value. (R. 1, Complaint, P 38.)

Both parties cite to *Levin v. Citibank, N.A.*, 2009 WL 3008378, 2009 U.S. Dist. LEXIS 85332, *8-*9 (N.D. Cal. Sept. 17, 2009), the only published opinion dealing with a class action TILA claim relating to reduction in HELOCs, to support their positions. The court in *Levin* declined to dismiss the plaintiff's complaint asserting a similar class action lawsuit under TILA and Regulation Z. In *Levin,* the plaintiff specifically alleged that he obtained an appraisal subsequent to receiving [*12] his notice of reduction in credit and that the appraisal indicated that the value of his home had declined less than ten percent from its value at the time plaintiff opened the HELOC. *Id.* at *3. Rather than imposing a requirement for a plaintiff to specifically allege facts supporting a claim that a home value did not decline significantly, the court in *Levin* merely held that the plaintiff's allegations regarding the value of his *home* were sufficient to survive a motion to dismiss even though Plaintiff did not allege that the *equity* in his home did not decline significantly. *Id.* at *8.

Similarly, in the present case, while Plaintiff did not specifically allege any factual support for its allegation that the value of his home did not decline significantly, Rule 8 does not require Plaintiff to plead such facts at this stage in the proceedings. *See Brooks,* 578 F.3d at 581 (federal pleading standard "simply calls for enough facts to raise a

reasonable expectation that discovery will reveal evidence supporting the plaintiff's allegations"). Plaintiff will have the opportunity to demonstrate the factual basis for his allegation that the value of his home has not declined significantly during [*13] the discovery process. Accordingly, the Court denies Defendant's Motion with respect to Count II.

2. Count IV -- HELOC Reduction Notices

In Count IV, Plaintiff alleges that Defendant violated TILA and Regulation Z because the notices sent to Plaintiff and class members informing them of the reduction in their HELOCs did not contain "specific reasons" for the action taken. (R. 1, Complaint, P 53.) Regulation Z states that "[i]f a creditor . . . reduces the credit limit applicable to a home equity plan . . . the creditor shall mail or deliver written notice of the action to each consumer who will be affected. The notice must be provided not later than three business days after the action is taken and shall contain specific reasons for the action. If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact." 12 C.F.R. § 226.9(c)(3).

The notice Defendant sent to Plaintiff informing him of the reduction in his HELOC stated that Defendant was "lowering the credit limit of [Plaintiff's] Account to $ 31,039.83 *due to a substantial decline in the value of the property securing the Account."* (R. 1-1, October 14, 2008 Letter, p. 1.) [*14] Despite the emphasized language in the October 14, 2008 Letter, Plaintiff asserts that the notice does not contain "specific reasons" for the reduction because the notice did not disclose (i) the value of the property as determined by Defendant or how Defendant determines that value, (ii) how Defendant determines "substantial decline in value," (iii) the methods or factors employed by Defendant's AVM models, (iv) the threshold property value required to reinstate the HELOC, and (v) other "necessary and material" information. (R. 1, Complaint, P 54.)

Plaintiff, however, provides no persuasive support for his contention that the reason given by Defendant in its notice to Plaintiff is not sufficiently "specific" to meet the standards of TILA and Regulation Z. In fact, Regulation Z lists six specific scenarios under which a lender may reduce a borrower's credit limit, including "any period in which . . . [t]he value of the dwelling that secures the plan declines significantly below the dwelling's appraised value for purposes of the plan." 12 C.F.R. § 226.5b(f)(3)(vi)(A); *see also* Official Commentary, cmt. 5(b)(f)(3)(vi)-4 ("[a] creditor may prohibit additional extensions of credit or reduce [*15] the credit limit in the circumstances specified in this section of the regulation"). The October 14, 2008 Letter thus specifically identifies a statutorily permissible reason for reducing Plaintiff's HELOC.

There are no requirements in TILA, Regulation Z or the Official Commentary that require Defendant to include any of the additional information Plaintiff cites in its Complaint. Indeed, the only authority cited by Plaintiff is a non-controlling Office of Thrift Supervision ("OTS") enforcement action notice of charges in which the OTS suggested that a lender's notice violated TILA because the notice, among other things, lacked documentation to support the lender's decision. (R. 30-1, Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Plaintiff's Opposition"), p. 10.) A review of the notice of charges in that matter reveals that the OTS determined that the lender violated Regulation Z when it refused to make advances on a series of HELOC loans. While the lender's notices informed borrowers that it had suspended advances on their HELOCs for "one or more" of the enumerated reasons contained in Regulation Z, the notice did not specify which reason. Contrary to the [*16] face of the notice in this case, therefore, the notices in the OTS matter were devoid of a specific reason for the change in the HELOC terms.

Although the Court must view the facts alleged in the light most favorable to Plaintiff, here, the face of the October 14, 2008 Letter squarely contradicts Plaintiff's claim that Defendant did not provide a specific reason for the HELOC reduction. *See, e.g., Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 544 (7th Cir. 2007) (upholding district court's dismissal of plaintiff's Fair Credit Reporting Act claim where, after review of relevant letter, court concluded that the letter offered plaintiff a "fair offer of credit" in accordance with FCRA requirements). Accordingly, the Court dismisses Count IV of Plaintiff's Complaint with prejudice.

3. Count VI -- Property Appraisals and Appeals Process

In Count VI, Plaintiff alleges that Defendant acted in violation of TILA and Regulation Z by requiring Plaintiff "to obtain and pay for property appraisals upfront in order to seek reinstatement as part of its 'appeals process.'" (R. 1, Complaint, P 64.) In support of this claim, Plaintiff alleges that in addition to pushing the burden of seeking reimbursement [*17] onto HELOC borrowers, which Plaintiff recognizes is permissible pursuant to TILA and Regulation Z, Defendant also "intentionally shifted onto its customers the burden of obtaining and paying *upfront*

for a property appraisal in an effort to discourage customers from seeking reinstatement of their original credit limits." *Id.* at P 59. Plaintiff contends this violates TILA and Regulation Z because "only after the lender investigates may the lender charge the borrower bona fide and reasonable costs and appraisal fees." *Id.* at P 58 (citing Official Commentary). Plaintiff's argument fails for two reasons. First, each of the statutory and regulatory provisions on which Plaintiff bases Count VI concern actions taken after a borrower requests reinstatement of its credit limit and Plaintiff has not alleged that he requested reinstatement. Second, Plaintiff has not alleged that Defendant demanded or collected any fees from Plaintiff or the class that Defendant did not incur.

As noted above, if a creditor reduces a borrower's HELOC limit, TILA requires the lender to provide written notice to the borrower informing the borrower of the reduction. 12 C.F.R. § 226.9(c). If the lender does not require [*18] the borrower to request reinstatement in its notice, the lender must monitor the line of credit on an ongoing basis to determine whether the conditions for the reduction still exist. *Id.* In the alternative, to avoid ongoing monitoring of the line of credit, the regulations also provide that "the creditor may shift the duty to the consumer to request reinstatement of credit privileges." *Id.* "If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact." *Id.*

> The Official Commentary further explains these requirements as follows: Creditors are responsible for ensuring that credit privileges are restored as soon as reasonably possible after the condition that permitted the creditor's action ceases to exist. One way a creditor can meet this responsibility is to monitor the line on an ongoing basis to determine when the condition ceases to exist. . . . As an alternative to such monitoring, the creditor may shift the duty to the consumer to request reinstatement of credit privileges by providing a notice in accordance with § 226.9(c)(1)(iii). A creditor may require a reinstatement request to be in writing if it notifies the consumer [*19] of this requirement on the notice provided under § 226.9(c)(1)(iii). Once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. Under this alternative, the creditor has a duty to investigate only upon the consumer's request.

Official Commentary, cmt. 5b(f)(3)(vi)-4. If a lender takes steps to investigate a borrower's request, the Official Commentary further explains that "a creditor may collect only bona fide and reasonable appraisal and credit report fees if such fees are actually incurred in investigating whether the condition permitting the freeze continues to exist." Official Commentary, cmt. 5b(f)(3)(vi)-3. Moreover, a "creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist." *Id.*

As an initial matter, each of the regulatory provisions and official comments upon which Plaintiff bases Count VI of his Complaint control situations where a borrower has requested reinstatement. In this case, the parties do no dispute that Defendant chose to shift the burden to its customers to request reinstatement. (R. 1-1, October [*20] 14, 2008 Letter, p. 1.) Indeed, in accordance with 12 C.F.R. § 226.9(c)(3), Defendant's notice to Plaintiff provided instructions for Plaintiff to request reinstatement if Plaintiff believed that the reasons stated for the reduction in the October 14, 2008 Letter no longer existed or if the determination was in error. *Id.* Nowhere in Plaintiff's Complaint does Plaintiff allege that he requested reinstatement of his HELOC. Instead, Plaintiff alleges that after receiving the reduction notice, he requested "the basis for Wells Fargo's decision." (R. 1, Complaint, P 16). Thereafter, in a letter dated October 20, 2008, Defendant provided the requested information to Plaintiff. (R. 1-3, October 20, 2008 Letter.) The letter explained the valuation method employed by the Defendant (AVM), as well as the date and results of the AVM. *Id.* The provisions cited in Count VI therefore do not govern the conduct of the parties as alleged in the Complaint.

Even if Plaintiff could establish that he requested reinstatement, Count VI still fails to state a claim sufficient to survive a motion to dismiss. In Count VI, Plaintiff claims that Defendant violated the provision of the Official Commentary that only [*21] allows creditors to collect appraisal fees if such fees are actually incurred by the lender. (R. 1, Complaint, P 39.) In Plaintiff's Opposition to the Motion, Plaintiff explains that Defendant "turns Regulation Z on its head and demands payment upfront before even attempting to satisfy its own legal obligations" and explains that this "practice of collecting upfront fees intentionally discourages customers from appealing the bank's HELCO reductions." (R. 30-1, Plaintiff's Opposition, p. 14.) Nowhere in the Complaint, however, does Plaintiff allege that Defendant ever demanded or collected payment from Plaintiff or any class member for fees that were not incurred by Defendant. While the Official Commentary reflects that a lender may not seek costs and

appraisal fees from borrowers unless the lender has undertaken an investigation and incurred fees, Plaintiff never alleges that Defendant sought costs from Plaintiff that Defendant did not incur, or that Defendant failed to undertake an investigation.

Moreover, neither the statute, regulations nor Official Commentary contain any provisions prohibiting Defendant from "shifting the burden of obtaining and paying upfront for a property appraisal" [*22] to borrowers. To the contrary, by including language governing a lender's ability to collect reimbursement from borrowers for appraisals, the Official Commentary reflects that the burden to pay for an appraisal may be placed on the borrower as long as the fees are bona fide and reasonable. Accordingly, because the Complaint and its attachments reveal that Defendant complied with the relevant provisions of TILA and its implementing regulations and Plaintiff has not presented any allegations to the contrary, the Court dismisses Count VI of Plaintiff's Complaint for failure to state a claim with prejudice. *See, e.g., Forrest,* 507 F.3d at 544 (upholding district court's dismissal of plaintiff's Fair Credit Reporting Act claim where, after review of relevant letter, court concluded that the letter offered plaintiff a "fair offer of credit" in accordance with FCRA requirements).

B. Declaratory Judgment -- Counts I, III, and V

Plaintiff also seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, that Defendant's mass HELOC reductions (Count I), letter notices to Plaintiff and the class (Count III), and shifting of the burden to obtains appraisals to [*23] Plaintiff and the class (Count V), violate TILA and Regulation Z. [2] (R. 1, Complaint, p. 22.) Defendant contends that the Court should dismiss Counts I, III, and V because (i) Plaintiff has not stated any viable claims pursuant to TILA and Regulation Z, and (ii) even if Plaintiff has successfully pled his claims, declaratory relief is not appropriate because it adds nothing to Plaintiff's claims for monetary damages. Plaintiff contends that declaratory relief is appropriate because Defendant's violations of TILA and Regulation Z are ongoing and continuously affecting homeowners and it would be useful to determine the legitimacy of Defendant's HELOC reductions going forward. As an initial matter, because Plaintiff has not stated any viable claims with respect to Defendant's letter notices to Plaintiff and the class (Count IV) and Defendant's shifting of the burden to obtain appraisals to Plaintiff and the class (Count VI), Plaintiff's requests for declaratory relief in Counts III and V based on the same alleged statutory violations necessarily fail. Because Plaintiff has stated a viable claim based on Defendant's HELOC reductions (Count II), the Court must address Plaintiff's request [*24] for declaratory relief in Count I.

> 2 Plaintiff premises Counts I and II (HELOC reductions where no substantial decline in value has occurred), III and IV (deficiencies in letter notices sent to Plaintiff and the class), and V and VI (shifting of the burden to obtain appraisals) on the same factual allegations and TILA provisions. In Counts I, III and V, Plaintiff seeks declaratory relief, and in Counts II, IV and VI Plaintiff seeks statutory damages.

"To seek a declaratory judgment, a party must show that there is 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Hoffman v. Sumner,* 478 F. Supp. 2d 1024, 1029 (N.D. Ill. 2007) (citing *In re VMS Sec. Litig.,* 103 F.3d 1317, 1327 (7th Cir. 1996)). "The primary purpose of [the Declaratory Judgment] Act is to avoid accrual of avoidable damages to one not certain of his rights and to afford him early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued." *In re Trans Union Corp. Privacy Litig.,* 211 F.R.D. 328, 340 (N.D. Ill. 2002) (citing *Cunningham Bros., Inc. v. Bail,* 407 F.2d 1165, 1167-68 (7th Cir. 1969)). [*25] However, "[i]f a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that court to proceed to the merits before staying or dismissing the action." *Wilton v. Seven Falls Co.,* 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (U.S. 1995).

While there is no express prohibition against declaratory relief contained in TILA, the statute contains a comprehensive damages scheme, including actual damages, statutory damages, and attorneys' fees and costs. *See* 15 U.S.C. § 1640(b). Moreover, Plaintiff has not established in any of his three claims for declaratory relief that the remedies contained in TILA would be ineffective or inappropriate. *See, e.g., In re Trans Union Corp,* 211 F.R.D at 340 (dismissing a claim for declaratory relief under the Fair Credit Reporting Act after finding that the claim "adds nothing to [plaintiff's] claims for monetary damages for the same violations"). Indeed, in his opposition, Plaintiff fails to offer any explanation for why TILA's statutory remedies are insufficient. District courts have discretion to deny declaratory relief when a more complete remedy is available. [*26] *Wilton,* 515 U.S. at 288 (1995); *see also In re VMS Sec. Litig.,* 103 F.3d at 1327 ("[e]ven when a district court has subject matter jurisdiction, it is not required

to declare the rights and relations of parties); *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.,* 819 F.2d 746, 747 (7th Cir. 1987) ("[i]t is well settled that the federal courts have discretion to decline to hear a declaratory judgment action, even though it is within their jurisdiction"); *City of Highland Park v. Train,* 519 F.2d 681, 693 (7th Cir. 1975) ("[w]hile the availability of another remedy does not preclude declaratory relief, a court may properly decline to assume jurisdiction in a declaratory action when the other remedy would be more effective or appropriate"). Accordingly, because TILA presents comprehensive remedies to Plaintiff and the class, the Court dismisses Count I of Plaintiff's Complaint without prejudice.

For the foregoing reasons, the Court dismisses Count I of Plaintiff's Complaint without prejudice, and dismisses Counts III and V of Plaintiff's Complaint with prejudice.

C. State Law Claims

Plaintiff's Complaint also asserts claims for breach of contract, breach of the implied covenant of good faith [*27] and fair dealing, consumer fraud, and unjust enrichment. Illinois law governs these claims. (R. 1-2, Contract, § 24.) Defendant requests the Court to dismiss each of these state law claims. For the following reasons, the Court grants Defendant's Motion with respect to Counts VIII, X and XI, denies Defendant's Motion with respect to Count VII, and grants in part and denies in part Defendant's Motion with respect to Count X.

1. Counts VII and VIII -- Breach of Contract

Plaintiff brings two claims for breach of contract. In Count VII, Plaintiff alleges that Defendant breached its Contract with Plaintiff by reducing Plaintiff's credit limit even though the value of Plaintiff's property did not decline significantly below its appraised value. In Count VIII, Plaintiff alleges that Defendant breached its Contract with Plaintiff by (i) continuing to assess Plaintiff and the class an annual fee for use of a HELOC account that Defendant had unilaterally decreased or suspended, and (ii) failing to provide Plaintiff and the class the use of the bargained-for credit limits under the HELOCs for the full term of their contracts.

To establish a breach of contract under Illinois law, a party must establish: [*28] (1) the existence of a valid and enforceable contract; (2) substantial performance of the contract; (3) breach of the contract; and (4) resultant damages. *See TAS Distrib. Co. v. Cummins Engine Co.,* 491 F.3d 625, 631 (7th Cir. 2007) (citing *W.W. Vincent & Co. v. First Colony Life Ins. Co.,* 351 Ill.App.3d 752, 286 Ill.Dec. 734, 814 N.E.2d 960, 967 (Ill. App. Ct. 2004)). In Illinois, the determination of whether a contract is ambiguous, as well as the construction of an unambiguous contract, are questions of law for the court. *See Gallagher v. Lenart,* 226 Ill.2d 208, 219, 314 Ill.Dec. 133, 140, 874 N.E.2d 43, 50 (Ill. 2007); *Central Ill. Light Co. v. Home Ins. Co.,* 213 Ill.2d 141, 153-54, 290 Ill.Dec. 155, 163, 821 N.E.2d 206, 214 (Ill. 2004). "In Illinois, as in other states, if a contract is unambiguous, the court will enforce it as written, without resorting to extrinsic evidence." *Curia v. Nelson,* 587 F.3d 824, 829 (7th Cir. 2009). "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher,* 226 Ill.2d at 232. Illinois courts interpret contracts according to the "four corners" rule: '" [a]n agreement, when reduced to writing, must be [*29] presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined by the language used. It is not to be changed by extrinsic evidence.'" *Camico Mut. Ins. Co. v. Citizens Bank,* 474 F.3d 989, 992-93 (7th Cir. 2007) (quoting *Davis v. G.N. Mortgage Corp.,* 396 F.3d 869, 878 (7th Cir. 2005) (citations and internal quotation marks omitted)). In applying this rule, Illinois courts first look to the language of the contract alone. *See Camico,* 474 F.3d at 993 (citing *Air Safety, Inc. v. Teachers Realty Corp.,* 185 Ill.2d 457, 462, 236 Ill.Dec. 8, 10, 706 N.E.2d 882, 884 (Ill. 1999)); *see also Gallagher,* 226 Ill.2d at 233 ("A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent."). Illinois courts interpret contract terms according to their plain meaning unless otherwise defined. *See Utility Audit, Inc. v. Horace Mann Serv. Corp.,* 383 F.3d 683, 687 (7th Cir. 2004).

The parties do not dispute the existence of a valid contract or substantial performance. Section 18 of the Contract provides that Defendant may [*30] "close [the] Account to future advances . . . [if] the value of the Property declines significantly below its original appraised value." (R. 1-2, Contract, § 18.) Plaintiff alleges that (i) Plaintiff performed under the Contract, (ii) Defendant materially breach Section 18 of the Contract by reducing Plaintiff's credit limit when no significant decline in value had occurred, and (iii) Defendant's breach damaged Plaintiff and the class by, *inter alia,* denying them full use of their bargained for credit limits and negatively affecting their credit scores. Repeating the arguments it made in opposition to Count II of the Complaint, Defendant contends that Plaintiff's assertion that the property did not decline significantly in value is without factual support.

As describe in detail above, however, Plaintiff's assertion complies with the federal pleading requirements. Based on the clear and unambiguous language of the Contract and the allegations contained in Plaintiff's Complaint, Plaintiff has alleged sufficient facts to make his breach of contract claim plausible. *See* Brooks, 578 F.3d at 581. [*31] Accordingly, the Court denies Defendant's motion to dismiss Count VII of Plaintiff's Complaint.

In Count VIII, Plaintiff argues that Defendant breached his Contract by charging him a $ 75 annual fee even after reducing his credit limit and by denying Plaintiff the bargained-for credit limit for the full 12-month period of the Contract. Section 18 of the Contract provides that, in the event of a closure or suspension of the account, Plaintiff "will continue to be responsible for full payment of the balance of [the] Account as well as all other account obligations, according to the terms of this Agreement." (R. 1-2, Contract, § 18.) In addition, Section 9 provides that each year the HELOC is open, "a $ 75 non-refundable Annual Fee will be charged to [Plaintiff's] account." *Id.* at § 9. Finally, the Contract also expressly contemplates that Defendant may reduce Plaintiff's credit limit. *Id.* at § 18.

The terms of the Contract contradict Plaintiff's allegations. Nothing in the Contract prohibits Defendant from assessing the $ 75 annual fee if Plaintiff's credit limit is reduced. Moreover, the Contract expressly indicates that Plaintiff's credit limit may be reduced during the term of the Contract, [*32] but that Plaintiff will still be responsible for all account obligations and fees. Plaintiff, therefore, has not pled any breach of contract based on Defendant's assessment of the $ 75 annual fee. *See* Thompson v. Illinois Dep't. of Prof'l Regulation, 300 F.3d 750, 754 (7th Cir. 2002) (where a plaintiff "relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim"); LaSalle Bank Nat'l Assoc v. Paramont Props., 588 F. Supp. 2d 840, 856 (N.D. Ill. 2008) (dismissing claim for breach of contract where no provision of the contract required the actions that plaintiff alleged were required of defendant). Accordingly, the Court dismisses Count VIII of Plaintiff's Complaint with prejudice.

2. Implied Covenant of Good Faith and Fair Dealing

In Count X, Plaintiff alleges that Defendant breached the implied covenant of good faith and fair dealing by (i) reducing his credit limit even though there was no significant decline in the value of his property, and (ii) failing to follow TILA and Regulation Z, an implied term of the Contract, by shifting the reinstatement burden to Plaintiff.

To establish a breach of the duty of good [*33] faith and fair dealing under Illinois law, the complaining party must show that the contract vested the opposing party with discretion in performing an obligation under the contract and the opposing party exercised that discretion in bad faith, unreasonably, or in a manner inconsistent with the reasonable expectations of the parties. Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443-45 (7th Cir. 1992); Gore v. Indiana Ins. Co., 376 Ill. App. 3d 282, 876 N.E.2d 156, 161-62, 315 Ill. Dec. 156 (Ill. App. Ct. 2007) ("Disputes involving the exercise of good faith arise when one party is given broad discretion in performing its obligations under the contract. The duty of good faith and fair dealing is a limitation on the exercise of that discretion, requiring the party vested with discretion to exercise it reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations.") (citations omitted)). "However, the 'obligation of good faith that exists in every contractual relation' is 'not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document.' Rather [*34] 'good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting." LaSalle Business Credit, Inc. v. Lapides, 2003 WL 722237, 2003 U.S. Dist. LEXIS 2901, *15 (quoting Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990)). "Illinois law holds that parties to a contract are entitled to enforce the terms to the letter and an implied covenant of good faith cannot overrule or modify the express terms of the contract." Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 395-96 (7th Cir. 2003).

While Plaintiff has alleged that the Contract gave Defendant discretion to determine whether a significant decline in value occurred, and that Defendant abused this discretion, Defendant's contention that Illinois does not recognize an independent cause of action for breach of the implied duty of good faith and fair dealing is correct. While all Illinois contracts contain an implied obligation to act in good faith, this obligation does not provide a person with a separate, independent cause of action. LaScola v. U.S. Sprint Communications, 946 F.2d 559, 565 (7th Cir. 1991). [*35] Indeed, courts regularly dismiss causes of action for breach of duty of good faith when they are not asserted *within* a breach of contract claim. *See, e.g.,* Vician v. Wells Fargo Home Mortg., 2006 WL 694740, 2006 U.S. Dist. LEXIS 26141, *24-*25 (N.D. Ind. Mar. 16, 2006) (dismissing Plaintiff's claim for breach of Illinois implied covenant of good faith and fair dealing where claim was pled as an independent claim and not as part of the breach of contract count); *see also* Aggarwal v. Nokia Corp. (In re Wireless Tel. 911 Calls Litig.), 2005 WL

1564978, 2005 U.S. Dist. LEXIS 13707 (N.D. Ill. June 3, 2005) (dismissing claim for breach of covenant "where plaintiffs have already asserted a separate breach of contract claim" and "claim for breach of the implied covenant of good faith and fair dealing" is rendered "superfluous"); *Miller v. Ford Motor Co.*, 152 F. Supp. 2d 1046 (N.D. Ill. 2001) (dismissing claim for breach of covenant of good faith and fair dealing where breach of contract claim subsumes allegations in support of breach of covenant claim and no independent cause of action exists). In fact, the Seventh Circuit has approved of such dismissals. *See* *Zeidler v. A&W Restaurants, Inc.*, 301 F.3d 572, 575 (7th Cir. 2002) [*36] ("we note that the district court correctly dismissed on the pleadings the [plaintiff]'s remaining claim that [defendant] breached an independent covenant of good faith and fair dealing" because "[t]he covenant is only an aid to interpretation, not a source of contractual duties or liability under Illinois law").

In this case, Plaintiff has alleged an independent cause of action for breach of contract based on the same allegations on which Plaintiff premises his breach of the duty of good faith and fair dealing claim. The duty of good faith, however, does not provide Plaintiff with an independent cause of action. The Court accordingly dismisses Count X of Plaintiff's Complaint with prejudice.

3. Illinois Consumer Fraud Act

In Count IX, Plaintiff brings a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1, *et. seq.*, for deceptive and unfair practices. The ICFA "is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 416-17, 266 Ill.Dec. 879, 775 N.E.2d 951 (Ill. 2002). [*37] The elements of a claim under the ICFA are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce. *See* *id.* at 417; *see also* *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 665 (7th Cir. 2008). In addition, "a private cause of action under ICFA requires a showing of proximate causation." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514-15 (7th Cir. 2006); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 200, 296 Ill.Dec. 448, 835 N.E.2d 801 (Ill. 2005) ("Proximate causation is an element of all private causes of action under the Act."). The proximate causation requirement applies to both misrepresentation and omission claims under the ICFA. *See* *Avery*, 216 Ill.2d at 202; *see also* *Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940, 944-45 (7th Cir. 2005).

Plaintiff alleges that Defendant's statements and conduct violate the ICFA in three ways: (i) Defendant's statements regarding the availability of credit through HELOCs were false; (ii) Defendant's conduct in employing AVM models that were inaccurate [*38] and unsubstantiated was deceptive and unfair; and (iii) Defendant's conduct in depriving borrowers of necessary information regarding credit reinstatement was deceptive and unfair. (R. 1, Complaint, PP85-87.) Defendant does not take issue with whether Plaintiff has sufficiently pled the elements of an ICFA claim. Instead, Defendant premises its Motion on its contentions that (i) Plaintiff's fraud claims are not pled with particularity as required by Rule 9(b), and (ii) TILA compliance is a bar to ICFA claims.

With respect to the first basis for Plaintiff's ICFA claim, Defendant's statements regarding the availability of credit through HELOCs, the Court dismisses Plaintiff's claim without prejudice because Plaintiff has failed to plead the necessary elements of a fraud claim. When plaintiffs allege fraud, Federal Rule of Civil Procedure 9(b) imposes the additional requirement that "the circumstances constituting the fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Particularity requires plaintiffs "to plead in detail the 'who, what, when, where, and how' of the circumstances constituting the fraud." *See* *Cumis Ins. Soc'y, Inc. v. Peters*, 983 F. Supp. 787, 792 (N.D. Ill. 1997) [*39] (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). That is, plaintiffs must plead "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Id.* (quoting *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082-83 (7th Cir. 1997)). Plaintiffs, however, need not plead information "uniquely within the defendant's knowledge." *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 778 n.5 (7th Cir. 1994). This particularity requirement applies to Plaintiff's ICFA claim. *See* *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 883 (7th Cir. 2005) (consumer fraud claims must be pled with the specificity required by Rule 9(b)).

Plaintiff has failed to plead the elements of a fraud claim with the requisite particularity. With respect to Defendant's statements regarding the availability of credit through the HELOCs, Plaintiff points to only one specific statement made by Defendant. Plaintiff alleges Defendant's false statements "include[d] that any potential future reduction of credit through the HELOCs would only occur through [*40] a substantial decline in property value."

(R. 1, Complaint, P 85.) Plaintiff, however, does not identify who made this statement, or when or where it was made. Indeed, in its Opposition to the Motion, Plaintiff states that the Complaint "sets forth allegations that Wells Fargo (the "who") makes false statements as to the legality of its credit limit reductions and the availability of credit (the "what") to its borrowers in letters and telephone calls (the "where") at the time Wells Fargo's HELOC reduction and suspension letters are sent and when customers call Wells Fargo's customer service representatives (the "when")." (R. 30-1, Plaintiff's Opposition, p. 15.) Plaintiff cites fourteen paragraphs of its Complaint to support this contention. A review of those paragraphs and the remainder of the Complaint, however, reveals that Plaintiff has not indentified any specific "statements" by Defendant regarding the *legality* of their credit limit reductions or the *availability* of credit.

In addition to failing to identify which statements he contends were false, Plaintiff also fails to allege who made the particular statements. While Plaintiff has included allegations in his Complaint regarding [*41] letters exchanged and phone calls with Defendant, Plaintiff does not cite specifically to those allegations to support its claim. Accordingly, it is unclear which statements form the basis of Plaintiff's fraud claim, when those statements were made, or by whom. Plaintiff has therefore failed to plead his fraud claim with respect to Defendant's alleged statements regarding the HELOCs with particularity, and the Court accordingly dismisses this portion of Count IX of the Complaint without prejudice with leave to replead. *See* *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs.*, 536 F.3d 663, 669 (7th Cir. 2008) ("the district court correctly determined that the complaint failed to plead with particularity the who, when and how of the alleged frauds, all of which are required by Rule 9(b) for allegations of fraud"); *United States v. All Meat & Poultry Prods. Stored at Lagrou Cold Storage*, 470 F. Supp. 2d 823, 830 (N.D. Ill. 2007) (finding that "[a]lthough the plaintiffs offer a few details about the content of the alleged deceptive statements--that the defendants falsely stated that the plaintiffs' food would be stored in sanitary conditions and would be returned on request--overall [*42] the allegations are too general to satisfy the heightened pleading requirements for claims of fraud" and that "Rule 9(b) requires specifics such as the name of the individual who made the statement, the specific date statement was made, to whom the statement was made, and the date of the statement").

Plaintiff's additional two claims under the ICFA, however, are premised on unfair and deceptive business practices, not fraudulent representations. The Seventh Circuit has held that "[b]ecause neither fraud nor mistake is an element of unfair conduct under Illinois' Consumer Fraud Act, a cause of action for unfair practices under the Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b)." *Windy City Metal Fabricators & Supply, Inc.*, 536 F.3d at 670. To determine whether conduct is unfair under the ICFA, a court must determine whether a plaintiff has established one of the following: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers." *Id.* at 669.

Plaintiff has sufficiently pled his second claim for [*43] unfair practices under the ICFA by alleging that Defendant's conduct in reducing borrower's HELOC limits without a sufficient factual basis and using faulty and inaccurate AVMs was "unfair, immoral and unscrupulous." (R. 1, Complaint, P 86.) Plaintiff alleges that Defendant intentionally used faulty and unreliable AVM models to provide misleading bases for reducing credit limit to consumers and that Defendant intentionally deprived borrowers of critical information in contravention of TILA and Regulation Z to discourage borrowers from seeking reinstatement of their HELOC limits. *Id.* at PP 86-87. Plaintiff also alleges that these practices occurred in commerce. *Id.* at P 84. Indeed, Defendant does not contest that Plaintiff has stated the elements for a claim of unfair practices under the ICFA. Accordingly, the Court declines to dismiss Plaintiff's claim for unfair practices regarding Defendant's use of AVM models under the ICFA.

Plaintiff's third ICFA claim with respect to depriving borrowers of critical information needed to determine whether to seek credit reinstatement, however, fails. The Seventh Circuit has held that compliance with statutory requirements contained in TILA is a [*44] defense under the ICFA. *Hoffman v. Grossinger Motor Corp.*, 218 F.3d 680, 684 (7th Cir. 2000) (citing *Lanier v. Associates Fin., Inc.*, 114 Ill. 2d 1, 499 N.E.2d 440, 447, 101 Ill. Dec. 852 (Ill. 1986)). This portion of Plaintiff's ICFA claim is derivative of Count IV. Here, Plaintiff again contends that Defendant's conduct in shifting the reinstatement burden onto Plaintiff and the class was a violation of TILA and Regulation Z and also deceptive and unfair in violation of the ICFA. As detailed above, however, Plaintiff's Complaint does not present any allegations establishing that Defendant's actions improperly shifted a burden to Plaintiff and the class in violation of TILA or Regulation Z. Accordingly, because the allegations in Plaintiff's Complaint establish that Defendant complied with the relevant notice and reinstatement provisions established by TILA, Regulation Z, and the Official Commentary, the Court dismisses Plaintiff's deceptive practices claim based on the same allegations with prejudice. *See id.* (ICFA claim rightly dismissed where Defendant established

compliance with relevant requirements in the federal Truth in Lending Act); *Swanson v. Bank of Am., N.A.*, 566 F. Supp. 2d 821, 828 (N.D. Ill. 2008) [*45] (dismissing ICFA claim for failure to state a claim where defendants' practices comply with TILA).

For the foregoing reasons, the Court dismisses Plaintiff's ICFA claims with respect to Defendant's statement regarding the availability of credit thought HELOCs without prejudice, (R. 1, Complaint, P 85), and dismisses Plaintiff's ICFA claims with respect to Defendant's conduct in depriving borrowers of critical information needed to determine whether to seek credit reinstatement with prejudice, *id.* at P 87. The Court denies Defendant's Motion with respect to Plaintiff's allegations of deceptive and unfair business practices premised on Defendant's use of AVM models. *Id.* at P 86.

4. Unjust Enrichment

Plaintiff's Complaint also contains a count for unjust enrichment. Plaintiff premises his unjust enrichment claim on the following allegations: (i) Defendant appreciated the benefits of utilizing improper valuation methods and requiring Plaintiff and the class to pay for appraisals; (ii) Defendant retained money that it should have provided to customers through their HELOCs by unlawfully reducing credit limits; and (iii) Defendant obtained benefits by continuing to assess and retain annual fees [*46] paid by Plaintiff and the class even though it unjustly reduced their HELOCs. (R. 1, Complaint, PP 101-104.)

"The doctrine of unjust enrichment underlies a number of legal and equitable actions and remedies." *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill.App.3d 1017, 1024, 329 Ill.Dec. 82 905 N.E.2d 920 (Ill. App. Ct. 2009). To establish an unjust enrichment claim under Illinois common law, a plaintiff must show that (1) the defendant has "unjustly retained a benefit to the plaintiff's detriment," and (2) the defendant's "retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 160, 137 Ill.Dec. 19, 545 N.E.2d 672 (Ill. 1989). "For a cause of action based on a theory of unjust enrichment to exist, there must be an independent basis that establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty." *Martis*, 388 Ill.App.3d at 1025. In other words, unjust enrichment "is not a separate cause of action that, standing alone, would justify an action for recovery." *Mulligan v. QVC*, Inc., 382 Ill.App.3d 620, 631, 321 Ill.Dec. 257, 888 N.E.2d 1190 (Ill. App. Ct. 2008). [*47] "Rather, it is a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence, and may be redressed by a cause of action based upon that improper conduct." *Martis*, 388 Ill.App.3d at 1024-25.

Under Illinois law, however, a cause of action for unjust enrichment is unavailable where, as here, the parties have entered into a contract which governs the dispute. *See Prima Tek II, L.L.C. v. Klerk's Plastic Indus.*, 525 F.3d 533, 541 (7th Cir. 2008) (applying Illinois law); *see also Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604, 296 Ill. Dec. 930, 953, 836 N.E.2d 681, 704 (Ill. App. Ct. 2005) ("where there is a specific contract that governs the relationship of the parties, the doctrine of unjust enrichment has no application"); *Nesby v. Country Mut. Ins. Co.*, 346 Ill. App. 3d 564, 566-67, 281 Ill. Dec. 873, 805 N.E.2d 241 (Ill. App. Ct. 2004) ("[t]he theory of unjust enrichment is an equitable remedy based upon a contract implied in law," and a cause of action for "unjust enrichment is only available when there is no adequate remedy at law"). Here, Plaintiff's Contract with Defendant governs each of the premises that [*48] support Plaintiff's claim for unjust enrichment, including the circumstances in which Defendant may reduce or freeze Plaintiff's HELOC, Defendant's imposition of an annual fee, and reinstatement of credit. (R. 1-2, Contract, §§ 9, 18-19.)

Indeed, Plaintiff appears to concede that he cannot plead an unjust enrichment claim based on the same allegations as his claims for breach of Contract and instead alleges and argues that he has pled his unjust enrichment claim in the alternative. (R. 1, Complaint, P 100.) This argument also fails. While a party may plead a claim for unjust enrichment in the alternative where the existence of a valid contract is questioned, if there is no dispute over the existence of a contract, a claim for unjust enrichment necessarily fails. *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 397 (7th Cir. 2003) ("a plaintiff may not pursue a quasi-contractual claim where there is an enforceable, express contract between the parties"). Here, the parties do not contest the existence of a valid, enforceable contract between the parties. (R. 1, Complaint, P 68) ("The terms of these HELOCs constitute a contract between the Class members and Defendant"); (R. 21-1, [*49] Defendant's Answer, P 68) ("Wells Fargo admits that the HELOC Agreement is a contract between Plaintiff and Wells Fargo."). Accordingly, Plaintiff's claim for unjust enrichment is dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendant's Motion. The Court dismisses Count I without prejudice. The Court dismisses Counts III, IV, V, VI, VIII, X, and XI with prejudice. The Court grants in part and denies in part Defendant's Motion with respect to Count IX. The Court denies Defendant's Motion with respect to Counts II and VII. Plaintiff is to file an Amended Complaint consistent with this opinion on or before February 15, 2010.

DATED: January 26, 2010

/s/ Amy J. St. Eve

AMY J. ST. EVE

United States District Court Judge